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IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

SHEILA WARNOCK SEUS,

Petitioner,

v.

JOHN NUVEEN & CO., INC.

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court of Appeals for the Third Circuit, in affirming the District Court's refusal to permit petitioner to conduct discovery of the sponsor of the arbitral forum and then compelling petitioner to arbitrate her federal and state statutory civil rights claims without consideration of the information about that forum which such discovery would have provided, erred in misapplying and expanding *Gilmer v. Interstate Lane/Johnson Corp.* beyond what this Court intended.

2. Whether the Court of Appeals for the Third Circuit, in affirming the District Court's decision compelling arbitration despite that court's refusal to consider the circumstances surrounding petitioner's execution of the required Form U-4, which formed the basis for compelling arbitration of her federal and state statutory civil rights claims, erred in misapplying and expanding *Gilmer v. Interstate Lane/Johnson Corp.* beyond what this Court intended.

3. Whether the Court of Appeals for the Third Circuit failed to follow *Gilmer* in refusing to consider the legislative history of the Civil Rights Act of 1991 or indicia of legislative purposes, when it concluded that Section 118 of the Civil Rights Act of 1991 on its face endorsed arbitration and that no amount of commentary from individual legislators or committees would justify a court in reaching a contrary result.

4. Whether the Court of Appeals for the Ninth Circuit in *Duffield v. Robertson Stevens & Co.,* was correct in holding that by enacting the Civil Rights Act of 1991 Congress intended to preclude the compulsory arbitration of Title VII claims.

LIST OF PARTIES

All parties appear in the caption of this petition on the cover page.

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SHEILA WARNOCK SEUS,

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JOHN NUVEEN & CO., INC.

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner respectfully submits that a writ of *certiorari* should issue to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The Opinion of the Court of Appeals is reported at 146 F.3d 175, 77 Fair Empl. Prac. Cas. (BNA) 751, 1998 U.S. App. LEXIS 11907, and is reprinted in the Appendix hereto at 1a-23a. The Judgment Order of the Court of Appeals dated and entered on June 8, 1998 is reprinted in the Appendix hereto at 24a-25a. The Order of the Court of Appeals dated

and entered on July 21, 1998 denying the appellant's petition for rehearing and for rehearing by the Court en banc is reprinted in the Appendix hereto at 26a-27a. The District Court's Opinion is reported at 77 Fair Empl. Prac. Cas. (BNA) 761, 1998 U.S. Dist. LEXIS 8209, and is reprinted in the Appendix hereto at 28a-39a.

JURISDICTION

The Order of the Court of Appeals denying the appellant's petition for rehearing and for rehearing by the Court en banc was dated and entered on July 21, 1998. This petition is being timely filed within 90 days of that denial of appellant's petition for rehearing and for rehearing by the Court en banc. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1). Petitioner first invoked federal court jurisdiction in the case under 28 U.S.C. §§ 1331 and 1367.

STATUTES INVOLVED

The following statutes are involved in this case: Section 118 of the Civil Rights Act of 1991, Pub. Law 102-166, the Older Workers Benefit Protection Act of 1990 (OWBPA), 29 U.S.C. § 626 (f), and the Federal Arbitration Act, 9 U.S.C. §§ 1 *et seq.* The pertinent text of these statutes is set forth in the Appendix hereto at 47a.

STATEMENT OF THE CASE

By affirming the District Court, the Court of Appeals for the Third Circuit has held that this Court's decision in *Gilmer v. Interstate Lane/Johnson Corp.,* 500 U.S. 20, 111 S.Ct. 1647 (1991) effectively disposes of all cases involving agreements to arbitrate under the rules of the New York Stock Exchange or National Association of Securities Dealers by virtue of execution of the Form U-4 which was considered in *Gilmer.*

Employees of brokerage firms, such as John Nuveen and Co. ("Nuveen"), must register as a mandatory condition of their employment with national securities exchanges such as the National Association of Securities Dealers ("NASD") or the New York Stock Exchange ("NYSE"). To comply with this

requirement all securities employees sign a Form U-4 registration statement. Form U-4 was developed by the Securities and Exchange Commission in conjunction with the national securities exchanges.

Pursuant to this policy, Nuveen required petitioner, Sheila Warnock Seus, to sign a Form U-4 on April 20, 1982, four months after she was initially hired. Petitioner had no choice but to sign the form as presented. Had she refused to sign the form, she could not work for any employer in the securities industry. The Form U-4 Petitioner signed included an arbitration provision. The provision stated that Petitioner agreed "to arbitrate any dispute, claim or controversy that may arise between me and my firm ... that is required to be arbitrated under the rules, constitution, or by-laws of the [NASD]." At that time Petitioner signed the registration form, Petitioner was told that the arbitration provision would not apply to her. Petitioner also never received a copy of the NASD's Code of Arbitration Procedures.

In 1982, the NASD's alternative disputes resolutions ("ADR") procedures did *not* provide for the arbitration of employment disputes. The NASD Code was amended in 1993 — eleven years after petitioner executed the Form U-4 registration agreement. The NASD Code changed to cover disputes "arising out of the employment or termination of employment of associated person." *See Kresock v. Bankers Trust Co.*, 21 F.3d 176, 178 (7th Cir. 1994); 58 Fed. Reg. 39,070 (1993). Although Petitioner remained employed at Nuveen for several years after the NASD enacted this important amendment, Nuveen never asked her to sign a new Form U-4 to specifically provide for the arbitration of employment disputes; nor did she ever agree to any modification to her original Form U-4. Petitioner was constructively discharged by Nuveen in July 1995. Up until that point in time, there was no mention of the mandatory arbitration of employment disputes anywhere in Nuveen's personnel policy or manuals. Indeed, it was not until Nuveen filed its Motion to Compel Arbitration that Nuveen first raised and Petitioner first discovered her "agreement" to arbitrate any and all employment-related disputes she might have with Nuveen.

A. The District Court Proceedings

After receiving a "Right to Sue Letter" from the Equal Employment Opportunity Commission, petitioner filed suit in the District Court asserting claims under Title VII, the ADEA, and related state antidiscrimination statutes.

Nuveen moved to dismiss the complaint and compel arbitration under the NASD Rules of Arbitration. In response to Nuveen's Motion to Compel Arbitration, petitioner submitted an Affidavit setting forth the circumstances surrounding her execution of the Form U-4 and what she was told by Nuveen representatives about what was covered by the Form U-4. See Affidavit at Appendix, 44a-46a. Even though this affidavit was unrebutted by Nuveen, the District Court ignored the issue of whether petitioner had knowingly and voluntarily agreed to arbitrate her Title VII and ADEA claims when she signed the Form U-4 in 1982. In addition, the District Court refused to permit petitioner to undertake discovery from the NASD about issues relating to the adequacy of the arbitral forum, which had been left open by this Court in *Gilmer,* before granting Nuveen's Motion to Compel Arbitration.

B. The Court of Appeals' Decision

Petitioner's appeal challenged court-ordered mandatary arbitration of employment disputes. Four arguments were presented for reversing the decision of the District Court compelling the arbitration of Petitioner's federal and state civil rights claims against Nuveen. The arguments included that it was reversible error for the court to find: (1) that Seus knowingly agreed to arbitrate her Title VII or ADEA claims even thought the NASD rules did not provide for the arbitration of employment disputes at the time Seus signed the Form U-4; (2) that federal law permits the enforcement of mandatary arbitration agreements that require an individual, as a condition of employment to submit future claims to arbitration; (3) that the procedural deficiencies in the NASD procedures did not prohibit granting the motion to compel arbitration; and (4) that even if the court were to find an agreement to arbitrate, the agreement is not excluded from coverage under the Federal Arbitration Act, Section 1, 9 U.S.C. § 1. In addition,

with respect to the argument that the procedural deficiencies in the NASD procedures should preclude granting Nuveen's motion to compel arbitration, Petitioner asserted that her Complaint was dismissed prematurely without permitting her to take discovery of the NASD regarding important facts surrounding its procedures.

The Court of Appeals rejected all the arguments raised when it affirmed the District Court's dismissal of Petitioner's claims, without allowing the Petitioner to engage in discovery of the actual workings of the NASD Arbitration system, thus precluding petitioner from creating a record establishing the inadequacy of NASD Arbitration in actual practice.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW EXPANDED AND MISAPPLIED THIS COURT'S DECISION IN *GILMER V. INTERSTATE LANE/JOHNSON CORP.* AND IS THEREFORE IN CONFLICT WITH A DECISION OF THIS COURT

A. *Gilmer v. Interstate Lane/Johnson Corp.* Did Not Close The Doors of The Federal Courts in a Title VII and/or ADEA Action Merely Because An Employee Has Been Required To Sign a Form U-4 as a Condition of Employment in the Securities Industry

It is respectfully submitted that the District Court and the Court of Appeals for the Third Circuit, in affirming the decision of the District Court, have expanded and misapplied this Court's decision in *Gilmer v. Interstate Lane/Johnson Corp.*, 500 U.S. 20, 111 S.Ct. 1647 (1991) to the point where *Gilmer* is cited as the basis for forever closing, locking, and barring the doors of every Federal Court in the Third Circuit to any plaintiff who was required to sign a Form U-4, as a condition of employment, no matter when it was executed; no matter the circumstances under which it was executed; no matter what the applicable Arbitration Rules might be (on their face and **in application**); and no matter what factual developments might have occurred since *Gilmer* was decided in 1991 by this

Court. In so holding the Court of Appeals for the Third Circuit ignored the factual developments subsequent to this Court's decision in *Gilmer* and decided an important federal issue in a way that conflicts with this Court's decision in *Gilmer.* In addition, the decision of the Court of Appeals for the Third Circuit conflicts with the decisions of courts in other Circuits which have correctly allowed the development of factual records upon which questions left open by this Court in *Gilmer* could be decided.

The Court of Appeals for the Third Circuit has chosen to read *Gilmer* as requiring a finding that if petitioner signed a Form U-4 at some point in time there was no need for the District Court to inquire any further into issues of the **fairness** and **adequacy** of the arbitral forum or the circumstances surrounding the petitioner's entry into the agreement to arbitrate, because this Court's decision in *Gilmer* foreclosed such inquiry for all time and in all cases involving the Form U-4 and arbitration under the rules of the New York Stock Exchange ("NYSE") or the National Association of Securities Dealers ("NASD"). Clearly, this view is inconsistent with the plain language of *Gilmer,* and the Courts in other Circuits have recognized that *Gilmer* did require them to consider a factual record (which could only be developed if discovery of the NASD were permitted) and to make a determination on that record of whether the unfairness or the inadequacy of the particular arbitration system or the circumstances under which the plaintiff "agreed" to arbitration under that particular system prior to the dispute arising required that court to deny the employer's motion to compel arbitration. The District Court for the District of Massachusetts in *Rosenberg v. Merrill Lynch,* 995 F. Supp 190 (D.Mass. 1998), appeal pending No.98-1426 (1st Cir.), in holding that NYSE Arbitration was an inadequate forum for vindication of civil rights claims, stated:

> In this case, Rosenberg has risen to the Supreme Court's challenge. She has not presented, nor would I credit, generalized arguments about the inherent incapacity of arbitrators to resolve statutory civil rights claims. She has instead put forward a detailed, concrete, and voluminous critique of the NYSE system. She offers depositions of

> securities industry personnel, official securities arbitration manuals, arbitration records, and reports of government investigations all purporting to raise doubts about the adequacy of the NYSE forum in particular.

995 F. Supp, at 206. As was noted at footnote 10, 995 F. Supp, at 198, significant discovery materials concerning securities industry arbitration considered by the Court in *Rosenberg* were generated in the case of *Duffield v. Robertson Stevens & Co.*, 144 F.3d 1182 (9th Cir. 1998) (in which there is now a Petition for Writ of Certiorari pending at No. 98-237), which held that the Form U-4 was unenforceable as applied to Title VII claims. The third recent case in which a court followed *Gilmer* but refused to compel arbitration was *Paladino v. Avnet Computer Technologies, Inc.*, 134 F.3d 1054 (11th Cir. 1998), taking into account lack of discovery, denial of the possibility of meaningful relief in an arbitration proceeding, and the high forum costs to the employee. Each of these cases stands for the proposition that Courts should allow a plaintiff to "... rise to the Supreme Court's challenge ..." and then give full consideration to what information now exists about the process of NASD Arbitration which did not exist at the time that *Gilmer* was decided.[1]

Prior to *Gilmer* in the case of *Nicholson v. CPC Intern. Inc.*, the Court of Appeals for the Third Circuit stated that:

> (1) No Supreme Court case requires us to close the doors of the Federal Courts in an ADEA action merely because the employer has included an arbitration clause in an employment contact.

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1. Indeed, after briefing of this case in the Court of Appeals for the Third Circuit, the NASD itself acknowledged the inadequacies of its system of Arbitration. See 62 Fed. Reg. 66164 et seq., 12/17/97. While the SEC has approved the NASD's proposed Rule change eliminating the requirement that as a condition of registration with the NASD, all registered representatives must arbitrate statutory employment discrimination claims before the NASD, the NASD continues to provide this Arbitration forum and the issue of its inadequacy to deal with these statutory employment claims remains open. See SEC Order Granting Approval to Proposed Rule Change Relating to the Arbitration of Employment Discrimination Claims, SR-NASD-97-77, SEC Release No. 34-40109 (June 22, 1998), effective January 1, 1999.

. . .

> (4) If this court holds Nicholson's arbitration agreement effectively precludes him from bringing his ADEA claim in a judicial forum, we may assume that many employers will prepare similar employment contracts, thereby shifting enforcement of the ADEA away from the courts to arbitration. If this is a result desired by Congress, we should wait for Congress to explicitly so state.

877 F.2d 221, at 231 (3rd Cir. 1989)

Even though the Court of Appeals for the Third Circuit rejected the arguments of petitioner and Amicus EEOC that neither the Older Workers Benefit Protection Act, 29 U.S.C. § 626 (f)(1)(C), nor Section 118 of the Civil Rights Act of 1991, Pub L. 102-166, § 118, preclude pre-dispute agreements to arbitrate employment claims, that does not mean that *Gilmer* mandates arbitration in all cases where a Form U-4 has been signed.

The District Court stated: "I also shall follow the lead of the Supreme Court in declining 'to indulge the presumption' that the NASD 'will be unable or unwilling to retain competent, conscientious, and impartial arbitrators.' (Memorandum Opinion, June 2, 1997 p.13, 37a). Yet the District Court **indulged the presumption** that because *Gilmer* determined that the NYSE Arbitration Procedure **appeared to be** fair and the District Court determined that the New York Stock Exchange's procedures "... are functionally equivalent to those of the NASD" (without any evidence to support this conclusion) (District Court Opinion, p. 15, 38a) there was no need for any discovery to be taken. The Court of Appeals for the Third Circuit in reviewing this denial of appellant's request to engage in discovery **failed to follow** *Gilmer.* While it is true that only generalized statements about the inadequacies of the arbitration procedure were presented in *Gilmer,* and based upon that this Court would not indulge in speculation that the process was unfair, **the converse is not true.** Although petitioner and the EEOC in their submissions to the District Court and the Court of Appeals provided significantly more information on why NASD arbitration was not an adequate

forum to vindicate a plaintiff's rights in employment discrimination matters, had petitioner been afforded the opportunity to conduct the requested discovery of the NASD (see Appendix 40a-43a), the District Court would have been presented with all the evidence of the shortcomings of the NASD arbitration process that this Court did not have the opportunity to consider in *Gilmer.* In the case of *Duffield v. Robertson, Stevens & Co., supra,* in the 9th Circuit, and in *Rosenberg v. Merrill Lynch, supra,* in the 1st Cir the plaintiffs were allowed to conduct discovery and the court in *Rosenberg* had before it the deposition testimony of the Director of Arbitration and others to carry out the analysis that this Court **invited** in *Gilmer.* Faced with that additional information the Court in *Rosenberg* determined that the procedure under the NYSE Arbitration Rules **was not fair.** *Rosenberg, supra,* at 212. Petitioner was denied the opportunity to similarly rise to this Court's challenge with respect to NASD Arbitration.

B. Mandatory Arbitration Is Not "Just Another Forum" for Resolution of Statutory Claims

In *Gilmer,* this Court upheld an arbitration agreement which required arbitration of a statutory age discrimination claim. It appears that this Court's ruling was based on several critical assumptions. First, the Court assumed that, "by agreeing to arbitrate a statutory claim, a party does not forego the substantive rights afforded by the statute; it only submits to their resolution in a arbitral, rather than a judicial, forum." 500 U.S. 26. In other words, this Court assumed — in the absence of proof to the contrary — that arbitration of statutory employment disputes would be "just another forum," essentially equivalent to federal court for purposes of vindicating statutory rights.

The Court's second critical assumption in *Gilmer* was that, "the prospective litigant **effectively may vindicate [his or her] statutory cause of action** in the arbitral forum," such that the specific statute at issue would "continue to serve both its remedial and deterrent function." *Gilmer,* 500 U.S. at 28 (emphasis added).

In the context of NASD Arbitration, both of these assumptions have proven simply incorrect. Arbitration in not "just another forum," and employees are often not able to effectively vindicate their statutory rights. Employees *do* lose substantive rights, including the right to have the civil rights laws applied and enforced as written.[2]

C. Petitioner Will Lose The Substantive Right to Have Statutory Employment Laws Enforced Correctly, Since Arbitrators Are Not Obligated To Follow Or Apply The Law, And Arbitrators' Decisions Are Virtually Unreviewable

One of the most important substantive rights an employee has is the right to have the civil rights laws applied and enforced as written. It would do little good for employees to have numerous protective statutes enacted by Congress if the courts were permitted to ignore or misapply these laws.

Yet, petitioner faces precisely this situation in a NASD Arbitration. Since courts are essentially powerless to review or correct arbitrators' decisions, arbitrators are empowered to ignore or misapply statutory law, including the civil rights laws, notwithstanding the Court of Appeals for the Third Circuit's passing reference to *Cole v. Burns Intern. Security Services,* 105 F.3d. 1465, 1486-7 (D.C. Cir. 1997), (146 F. 3d, at 188, 23a).

1. Arbitrators Are Sometimes Expressly Instructed That They Are Not Obligated To Follow Statutory Law

Arbitrators are sometimes told that they have no obligation to follow statutory law in the first place. For example, in NASD Arbitration, arbitrators are specifically instructed that they "are not strictly bound by case precedent or statutory law."[3]

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2. See, e.g. Bompey & Pappas, *Is There A Better Way? Compulsory Arbitration of Employment Discrimination Claims After Gilmer,* 19 Empl. Rel. L. J. 197, 208 (1994); *accord,* Bompey & Stempiel, *Four Years Later: A Look At Compulsory Arbitration of Employment Discrimination Cases After Gilmer v. Interstate/ Johnson Lane Corp.,* 21 Empl. Rel. L.J. 21, 43 (1995).

3. See *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, supra,* at 198 (D.Mass. 1998) (quoting the Securities Industry Conference on *Arbitra-*

Even if an arbitrator feels obligated to follow the law, he or she may make an error of law; but it is virtually impossible to overturn even the most egregious errors of law, for two reasons. First, the standard of review is exceedingly narrow. Second, arbitrators are not required to set forth any written explanation of their decision, so there is rarely a record or written opinion for a Federal Court to review.

2. The Applicable Standard of Review Makes It Virtually Impossible to Overturn Arbitrators' Errors of Law

With respect to arbitration awards under the Federal Arbitration Act, 9 U.S.C. § 1 et seq., a decision may not be overturned unless the arbitrator's decision is in " 'manifest disregard' of the law."[4] But this standard is virtually impossible to meet. First, vacating the award cannot be justified merely because an arbitrator made a clear error in interpretation or application of law. Instead, the party must prove that the arbitrators "... were aware of the law, understood it correctly, found it applicable to the case before them, and yet specifically chose to ignore it in propounding their decision." *Remmey v. Paine Webber,* 32 F.3d 143, 149 (4th Cir. 1994).

One need look no farther than the case of *DiRussa v. Dean Witter,* 121 F.3d 818 (2d Cir. 1997), in which the arbitrator failed to award attorneys' fees to a prevailing plaintiff in a discrimination case, in plain violation of the statutory requirements, to see that the "judicial review" envisioned by this Court in *Gilmer* is meaningless. In that case, the arbitrator's plainly erroneous decision was affirmed by the courts, which stated that even though the arbitrator was clearly wrong under the law, his decision would not be modified or reversed, since there was no clear proof that the arbitrator had "known" the correct law and had then intentionally "disregarded" it. 121 F. 3d, at 821. As long as the arbitrator was simply "ignorant" of the correct law, the arbitration decision would be affirmed. Thus, petitioner gives up substantive rights if compelled to use

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tion Arbitrator's Manual). Thus, in a discrimination case, NASD arbitrators are essentially being told that they need not follow the civil rights laws as written.

4. *First Options v. Kaplan,* 514 U.S. 938, 115 S.Ct. 1921, at 1923 (1985).

NASD Arbitration as the forum to vindicate her rights, which she would not give up in the Federal Courts.

3. Since Arbitrators Often Give No Written Opinion or Explanation For Their Award, Overturning The Award Is Virtually Impossible

For a party wishing to challenge an arbitration award, proving that the arbitrators "... were aware of the law, understood it correctly, found it applicable to the case before them, and yet specifically chose to ignore it in propounding their decision" (*Remmey, supra* at 149), is a practical impossibility, since arbitrators are rarely required to set forth any explanation for their decision.[5] As one court has noted, "... when arbitrators do not give their reasons, it is nearly impossible for the court to determine whether they acted in disregard of the law." *O.R. Securities v. Prof. Planning Assoc.*, 857 F.2d 742, 747 (11th Cir. 1988).

In sum, NASD arbitrators do not need to follow statutory law, and do not need to issue any written explanation or rationale for their award. Thus, it is usually *impossible* for a party to establish that an arbitrator has ever engaged in "manifest disregard."

In *Gilmer,* this Court "assumed" that there would be "sufficient" judicial review of the arbitration decision "to ensure that arbitrators complied with the requirements of the statute." See *Gilmer,* 500 U.S. at 32, n. 4. In the real world, this assumption has proven to be groundless, as few arbitration decisions provide enough information to make such a review possible. This is yet another reason why mandatory arbitration of statutory employment claims cannot be justified.

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5. In the securities industry, arbitrator training manuals *discourage* arbitrators from giving any written analysis, in order to avoid judicial review. *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, supra,* 198 at footnote 9, 10 (D.Mass. 1998) (citing awards and materials used in National Association of Securities Dealers arbitrator training sessions generated through permitted discovery).

4. The Costs To Petitioner To Vindicate Her Rights May Well Be Exorbitant

A plaintiff who is free to pursue his or her employment discrimination claim in the federal courts does not have to pay a federal court judge and jury to hear his or her discrimination claims; access to the public courts is free, once the initial filing fee is paid. By contrast, a plaintiff who signed a Form U-4 and is being required to submit to NASD arbitration faces exorbitant "forum" costs. While a sampling of forum fees was presented to the lower courts, had petitioner been permitted to conduct the discovery of the NASD that she requested, unlike the record before this Court in *Gilmer,* she would have created a factual record for the lower courts and this Court demonstrating that the reality of the costs of NASD Arbitration process is far different than this Court envisioned when *Gilmer* was decided.

The outlandish costs and fees imposed on those compelled to arbitrate acts as a significant barrier to employees in the securities industry (since not everyone who works in the industry has the financial means to pay such fees), and may deter employees from exercising their statutory rights. Several circuits have recently found that the imposition of such fees on plaintiffs renders such an arbitration agreement unenforceable. *Cole v. Burns, supra,* 105 F.3d at 1483; *Paladino v. Avnet Computer, supra,* 134 F.3d, at 1062. Neither the District Court nor the Court of Appeals in this case saw a need to address the issue of "forum fees" which was not an issue presented to this Court in *Gilmer,* but which is clearly an issue that seriously concerns an increasing number of courts.

Prevailing plaintiffs who are required to pay these "forum fees" frequently suffer the additional economic burden that arbitrators may misapply or ignore statutory law, and may fail to award prevailing plaintiffs their costs or attorneys fees. *See DiRussa v. Dean Witter, supra* (arbitrator failed to award prevailing plaintiff in discrimination case costs and attorneys fees, even though such an award was required under the civil rights laws; court powerless to correct this error).

5. In Arbitration, Significantly Limited Discovery Unfairly Burdens Employees Attempting to Vindicate Statutory Rights

Arbitration works best when it involves parties of equal bargaining power who have equal access to the evidence. However, a plaintiff in a discrimination case is at a severe disadvantage in an arbitration setting. An employee generally needs extensive discovery if she is going to establish her claims. The plaintiff not only has the burden of proof, but the plaintiff in many employment cases (including discrimination cases) must prove "state of mind," or show "pretext" by the employer, or show a "pattern" of discrimination or conduct. Without full and complete discovery, a plaintiff is greatly handicapped in attempting to prove her claims.

Whatever limited discovery may be allowed is left to the discretion of the arbitrator. Significantly, the severe limitations on discovery in arbitration heavily favor the **employer** in any employee/employer dispute, since **the employer usually controls almost all of the critical evidence in a case.**

Once again the District Court and the Court of Appeals for the Third Circuit made **assumptions** about the discovery available under NASD Rules being adequate without any record evidence and **without permitting Petitioner the opportunity to show the inadequacy through discovery of the designated representative of the NASD.**

6. The Arbitration Process Is Not Expeditious

This Court in *Gilmer* envisioned that "... by agreeing to arbitrate, a party 'trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and **expedition** of arbitration.' *Mitsubishi, supra,* at 628, 105 S.Ct., at 3354." 500 U.S., at 31. (emphasis added). In Federal Court once a jury trial commences, absent some extraordinary circumstance, it continues on consecutive days until concluded. Although petitioner submitted a sampling of Arbitration Awards to the lower courts which showed that the norm is for arbitration cases to continue on for many months and sometimes years, with the dates of hearing being widely spaced, again, petitioner was denied the opportunity, as the plaintiffs

in *Rosenberg, supra,* and *Duffield, supra,* were permitted, to show that the process of NASD Arbitration was anything but what this Court envisioned when it decided *Gilmer* in 1991.

D. The Court of Appeals Erred in Holding That The Standard for "Knowing and Voluntary" Waiver Articulated in *Cirillo v. Arco Chemical Co.* Was Inapplicable Because of *Gilmer*

It is respectfully submitted that *Gilmer* did not overrule the decision of the Court of Appeals for the Third Circuit in *Cirillo v. ARCO Chemical Co.,* 862 F.2d 448 at 451 (3rd Cir. 1988) and that *Cirillo* remains viable with respect to the signing of a Form U-4 in 1982 by petitioner under the circumstances as described in her Affidavit (at Appendix 44a-46a).

For the reasons articulated above, it is submitted that NASD Arbitration indeed affects substantive rights, and simply because this Court in *Gilmer* found that the U-4 signed by Mr. Gilmer required that his case be arbitrated under the NYSE Rules of Arbitration, does not compel the lower courts to ignore the analysis articulated in *Cirillo.*[6]

II. THE DECISION BELOW CONFLICTS WITH THE DECISION OF THE COURT OF APPEALS FOR THE NINTH CIRCUIT

Presently pending before this Court is the Petition for Writ of Certiorari filed by Robertson Stephens & Company in *Duffield, supra,* at No. 98-237, seeking review of the decision of the Court of Appeals for the Ninth Circuit which held that the Civil Rights Act of 1991 precludes compulsory arbitration of civil rights claims and the Form U-4 signed by Tonyja Duffield was unenforceable to the extent that it required arbitration of Title VII claims as a condition of employment in the

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6. Among the factors articulated in *Cirillo, supra,* are: (1) the clarity and specificity of the [Form U-4] language [concerning what was subject to arbitration]; (2) the plaintiff's education and business experience; ... (4) whether plaintiff knew or should have known [what statutory rights he was agreeing prospectively to arbitrate] at the time of signing the [Form U-4]; (5) whether plaintiff was encouraged to seek, or in fact received the benefit of counsel.

securities industry. Contrary to the position taken by Robertson Stephens & Company in that case, the Court of Appeals for the Ninth Circuit **did follow** *Gilmer* in determining that Congress intended to preclude compulsory arbitration of civil rights claims, stating:

> In the end, what is perhaps the most compelling reason for rejecting Robertson Stephens' argument is the specific instruction in *Gilmer* and several preceding arbitration cases to look to the statute's terms and to "its legislative history," as well as its underlying purpose, in determining whether Congress "evinced an intention to preclude a waiver of judicial remedies" in the particular circumstances. *Gilmer,* 500 U.S. at 26.

144 F. 3d, at 1198.

The Court of Appeals for the Third Circuit **did not follow** *Gilmer* in refusing to consider the 1991 legislative history or indicia of legislative purposes relied upon by the Ninth Circuit, concluding that Section 118 of the Civil Rights Act of 1991 on its face endorsed arbitration and that ". . . no amount of commentary from individual legislators or committees would justify a court in reaching the result the EEOC [and the Ninth Circuit] would have us reach. . . ." 146 F. 3d, at 182, namely that Congress intended to preclude compulsory arbitration of civil rights claims. This Court, however, held in *Gilmer* that a congressional intent to preclude a compelled waiver of the right to litigate statutory claims in court may be found in the text of a statute, in its legislative history, or in an inherent conflict between compulsory arbitration and the statute's underlying purpose. *Gilmer,* 500 U. S. at 26.

III. CONCLUSION

By denying petitioner the ability to engage in discovery of the NASD, which would have allowed the petitioner the ability to present specific information to show the court below that arbitration under the NASD Arbitration Rules would not allow the petitioner to effectively vindicate her rights in a forum that: (1) is fair; (2) not outrageously expensive to use;

(3) results in expeditious disposition; and (4) allows meaningful court review — all of which was **assumed** by this Court in *Gilmer* **because the record as to these issues was not developed in that case,** the District Court and Court of Appeals failed to follow *Gilmer.*

Further, it is respectfully submitted that there **was unrebutted evidence** before the District Court as to the circumstances of execution of the Form U-4, which show that there was **not** a knowing and voluntary waiver by petitioner of her rights to pursue her claims under Federal Civil Rights Statutes in Federal Courts, and *Gilmer* did not require the lower courts to forego an analysis of this issue simply because a Form U-4 was at issue in *Gilmer.*

Finally, a conflict between the Ninth Circuit and the Third Circuit exists with respect to whether Congress intended to preclude arbitration of Title VII and state statutory antidiscrimination claims in enacting the Civil Rights Act of 1991.

For all of the foregoing reasons, it is respectfully submitted that the Petition for Writ of *Certiorari* should be Granted.

Respectfully submitted,

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Dated: October 19, 1998

APPENDIX

Filed June 8, 1998

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 97-1498

SHEILA WARNOCK SEUS,
Appellant

v.

JOHN NUVEEN & CO., INC.

On Appeal From the United States District Court
For the Eastern District of Pennsylvania
(D.C. Civil Action No. 96-cv-05971)

Argued January 20, 1998

BEFORE: BECKER,* and STAPLETON, *Circuit Judges*, and FEIKENS,** *District Judge*

(Opinion Filed June 8, 1998)

Stephen C. Richman (Argued)
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* Honorable Edward R. Becker, United States Circuit Judge for the Third Circuit, assumed Chief Judge status on February 1, 1998.

** Honorable John Feikens, Senior United States District Judge for the Eastern District of Michigan, sitting by designation.

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OPINION OF THE COURT

STAPLETON, *Circuit Judge*:

Sheila Warnock Seus sued John Nuveen & Company, Inc., her former employer, under Title VII and the ADEA. Because Seus, at the commencement of her employment, had signed a Uniform Application for Securities Industry Registration that contained arbitration and compliance clauses, the district court granted the employer's motion to compel arbitration of her claims pursuant to the Federal Arbitration Act. The court also denied Seus's motion for leave to take depositions of the National Association of Securities Dealers ("NASD"). We will affirm.

I. BACKGROUND

In 1982, Sheila Seus joined the Nuveen brokerage firm. As a member firm of the NASD, Nuveen is required to register with the NASD all employees who deal directly with the public in the purchase and sale of over-the-counter

securities. To comply with this requirement, employees complete a Uniform Application for Securities Industry Registration, commonly referred to as a Form U-4. Approximately four months after she was hired, Seus was required to sign a Form U-4. The Form contained the following arbitration clause:

> I agree to arbitrate any dispute, claim or controversy that may arise between me and my firm . . . that is required to be arbitrated under the rules, constitution, or by-laws of the [NASD].

App. at 5 (Form U-4, ¶ 5). The Form also contained a "compliance clause," under which Seus agreed to:

> abide by, comply with, and adhere to all the provisions, conditions and covenants of the . . . by-laws and rules and regulations of the [NASD] as they are and may be adopted, changed or amended from time to time . . .

App. at 5 (Form U-4, ¶ 2).

At the time Seus executed the Form U-4, the NASD Code of Arbitration Procedure required arbitration of:

> any dispute, claim or controversy arising out of or in connection with the business of any member of the [NASD], with the exception of disputes involving the insurance business of any member which is also an insurance company: (1) between or among members; (2) between or among members and public customers, or others; and (3) between or among members [and] registered clearing agencies . . . .

NASD Manual – Code of Arbitration Procedure § 1 (reprint ed. May 1982). Although the NASD Code in effect in 1982 did not explicitly state that employment disputes were subject to arbitration, the Code was amended in 1993 to do so. The current Code expressly provides for arbitration of "any dispute, claim, or controversy . . . arising out of the employment or termination of employment of associated person(s) with any member." *NASD Manual- Code of Arbitration Procedure* Rule 10101 (formerly § 1) (1997).

In 1996, Seus filed suit against Nuveen in the district court, alleging multiple claims of discrimination under Title

VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. §§ 2000e *et seq.*, and the Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. §§ 621 *et seq.* Based on Seus's execution of her Form U-4, Nuveen filed a motion to dismiss and compel arbitration pursuant to the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 3-4. Seus, in turn, filed a motion for leave to take the deposition of the NASD pursuant to Fed. R. Civ. P. 30(b)(6) to obtain information regarding the rules, procedures, and results obtained in other employment disputes arbitrated under NASD rules.

The district court granted Nuveen's motion and dismissed Seus's complaint without prejudice, directing her to arbitrate her claims. The court concluded that the Form U-4 executed by Seus constituted a valid contractual agreement to arbitrate enforceable under the FAA, and that the arbitration agreement covered the claims asserted in this case.

The district court also denied Seus's motion to depose the NASD. It noted that the Supreme Court in *Gilmer* recognized the adequacy of the New York Stock Exchange's arbitration procedures, which the district court found to be "functionally equivalent" to those of the NASD. D. Ct. Op. at 15. The district court also concluded that the NASD Code of Arbitration Procedure, which details discovery procedures and subpoena powers, etc., provides information sufficient to evaluate the fairness of the arbitration process.

In accordance with our usual practice in arbitration cases, we will address, in turn, whether there is a binding agreement to arbitrate between the parties and, if so, whether this dispute is within the scope of that agreement. *See PaineWebber Inc. v. Hartmann*, 921 F.2d 507, 511 (3d Cir. 1990). We will then determine whether the district court abused its discretion in denying Seus's motion for discovery from the NASD. *See Marroquin-Manriquez v. INS*, 699 F.2d 129, 134 (3d Cir. 1983).

II. IS THERE A BINDING AGREEMENT TO ARBITRATE?

A. *The FAA*

The FAA, 9 U.S.C. § 1 *et seq.*, was enacted in 1925. Its purpose was to make agreements to arbitrate enforceable to the same extent as other contracts. Section 2 of the Act provides, in relevant part:

> A written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy arising out of such contract . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for revocation of any contract.

"Commerce," as defined in the Act, includes "commerce among the several States." 9 U.S.C. § 1. "[C]ontracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce" are excluded from the scope of the Act, however. *Id.* The Form U-4 has been held by the Supreme Court to be a "contract evidencing a transaction in commerce" and not to be "a contract of employment" within the meaning of the FAA. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 25 n.2 (1991). This court and others have also held that the "contract of employment" exception is limited to the contracts of employees who, like seamen and railroad workers, are engaged directly in the channels of interstate commerce. *See Great Western Mortgage Corp. v. Peacock*, 110 F.3d 222, 226-27 & nn.20-21 (3d Cir. 1997) (stating Third Circuit rule and collecting cases from other jurisdictions).

If a party to a binding arbitration agreement is sued in a federal court on a claim that the plaintiff has agreed to arbitrate, it is entitled under the FAA to a stay of the court proceeding pending arbitration, Section 3, and to an order compelling arbitration, Section 4. If all the claims involved in an action are arbitrable, a court may dismiss the action instead of staying it. *See Alford v. Dean Witter Reynolds, Inc.*, 975 F.2d 1161, 1164 (5th Cir. 1992); *Dancu v. Coopers*

& Lybrand, 778 F. Supp. 832, 835 (E.D. Pa. 1991), *aff'd*, 972 F.2d 1330 (3d Cir. 1992).

Thus, the FAA on its face authorizes the enforcement action taken by the district court. It follows that we must affirm unless we conclude that legislation passed subsequent to the FAA reflects a congressional intent that agreements like the Form U-4 contract be excluded from it scope, that this Form U-4 contract is unenforceable under the provisions of the FAA, or that this dispute is not within the scope of the arbitration provision of that contract.

B. The ADEA, OWBPA, Title VII And The Civil Rights Act of 1991:

The Implied Repealer Challenge To The Validity Of The Agreement

Seus contends that Congress, in legislation subsequent to the FAA, has carved out an exception to its provisions for predispute agreements to arbitrate claims under the ADEA (i.e., agreements to arbitrate ADEA claims that have not arisen at the time the agreement is reached). The EEOC, which has filed an amicus brief in support of Seus's position, contends that a similar exception has been created by Congress for predispute agreements to arbitrate claims under Title VII as well. We find no such implied repealer of the FAA's provisions requiring the enforcement of agreements to arbitrate.

1. *Gilmer and the ADEA*

An argument much like that of Seus and the EEOC was made to the Supreme Court in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), a case that involved an ADEA claim and a Form U-4 agreement between an employee of a brokerage firm and the New York Stock Exchange. Plaintiff Gilmer was required to register with several stock exchanges, including the New York Stock Exchange ("NYSE"), as a condition of his employment. To do so, he executed a Form U-4 application containing the same language regarding arbitration as the Form U-4

signed by Seus except that his commitment was to arbitrate in accordance with the rules of the NYSE. The NYSE Rules in place at the time Gilmer signed his Form U-4 explicitly provided for the arbitration of any controversy between a registered representative and a NYSE member " 'arising out of the employment or termination of employment of such registered representative.' " *Id.* (quoting NYSE Rule 347). Following Gilmer's termination at age 62, he filed an age discrimination charge with the EEOC and thereafter filed suit against his employer. In response to the employer's insistence that his claim be arbitrated, Gilmer argued that enforcement of the Form U-4 agreement to arbitrate would be inconsistent with the ADEA.

The Supreme Court began its analysis by making it clear that exceptions to the FAA's rule requiring enforcement of agreements to arbitrate are not to be recognized lightly. Because of the strong federal policy favoring arbitration, any exception must be founded on clear indicia of congressional intent:

> "[H]aving made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue." In this regard, we note that the burden is on Gilmer to show that Congress intended to preclude a waiver of a judicial forum for ADEA claims. If such an intention exists, it will be discoverable in the text of the ADEA, its legislative history, or an "inherent conflict" between arbitration and the ADEA's underlying purposes. Throughout such an inquiry, it should be kept in mind that "questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration."

Id., at 26 (citations omitted).

Gilmer conceded that nothing in the text or legislative history of the ADEA explicitly precluded enforcement of the FAA in his situation. Rather, he argued that "compulsory arbitration of ADEA claims pursuant to arbitration agreements would be inconsistent with the statutory framework and purposes of the ADEA." *Id.* at 27. The Supreme Court perceived no such inconsistency.

The Court held that the FAA required enforcement of Gilmer's agreement to arbitrate all claims arising out of his termination of employment, including his ADEA claim. It stressed that "[b]y agreeing to arbitrate a statutory claim, a party does not forego the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial form.." *Id.* at 26 (quoting from *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1987)) (alteration in original). Rejecting Gilmer's argument that the arbitral process was less suited than litigation to the effective enforcement of the ADEA, the Court concluded: "[S]o long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function." *Id.* at 28 (quoting from *Mitsubishi, supra*, at 637) (alterations in original).

The Court in *Gilmer* also addressed and rejected an argument that agreements to arbitrate ADEA claims should not be enforced because of the disparity in bargaining power between an employee and her employer. In the course of rejecting the argument, the Court stressed that courts should look solely to the provisions of the FAA in determining on a case-by-case basis whether an arbitration agreement is binding:

> Mere inequality in bargaining power, however, is not a sufficient reason to hold that arbitration agreements are never enforceable in the employment context. . . [T]he FAA's purpose was to place arbitration agreements on the same footing as other contracts. Thus, arbitration agreements are enforceable "save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. "Of course, courts should remain attuned to well-supported claims that the agreement to arbitrate resulted from the sort of fraud or overwhelming economic power that would provide grounds for the revocation of any contract." *Mitsubishi*, 473 U.S., at 627. There is no indication in this case, however, that Gilmer, an experienced businessman, was coerced or defrauded into agreeing to the arbitration clause in his registration application.

> As with the claimed procedural inadequacies discussed above, this claim of unequal bargaining power is best left for resolution in specific cases.

Id. at 33.

Finally, the *Gilmer* Court rejected an argument based on its prior decision in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974). *Alexander* held that an adverse decision in an arbitration proceeding conducted pursuant to an arbitration clause in a collective bargaining agreement could not bar the plaintiff employee from enforcing his rights under Title VII in a federal court. In *Gilmer*, the Court acknowledged that it had expressed the view in *Alexander* that "arbitration was inferior to the judicial process for resolving statutory claims." *Gilmer*, 500 U.S. at 34 n.5. It hastened to add, however:

> That "mistrust of the arbitral process," however, has been undermined by our recent arbitration decisions. *McMahon*, 482 U.S. at 231-32. "[W]e are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626-627 (1985).

Id.

Thus, the Court specifically disavowed, in the context of Title VII claims as well as ADEA claims, the idea that the arbitral process was inferior to the judicial process. It also stressed that because the arbitration clause in *Alexander* was contained in a collective bargaining agreement, Alexander had not individually agreed to it, "the tension between collective representation and individual statutory rights" was an "important concern," and the FAA, with its "liberal federal policy favoring arbitration," was not applicable. *Id.* at 35.

2. *OWBPA*

Gilmer was decided on May 13, 1991. Seven months earlier, Congress amended the ADEA by passing the Older

Workers Benefit Protection Act of 1990 ("OWBPA"). Gilmer apparently did not contend that these amendments were applicable to his case. Seus and the EEOC do contend that they are applicable here. Under the OWBPA, an individual "may not waive any right or claim" under the ADEA unless the waiver is knowing and voluntary. 29 U.S.C. § 626(f)(1). Moreover, a waiver cannot be considered knowing and voluntary if an individual waives "rights or claims that may arise after the date the waiver is executed." Id. at § 626(f)(1)(C). Seus and the EEOC assert that the language "any right or claim" must encompass the right to a jury trial in district court; thus, the OWBPA prohibits the enforcement of any agreement that requires an individual, in advance of an actual dispute, to forgo her statutory right to trial in a district court. They conclude that the OWBPA precludes enforcement of Seus's agreement to arbitrate. We are unpersuaded for two reasons.

First, the legislative history of the OWBPA indicates that it does "not apply with respect to waivers that occur before the date of enactment of this Act [Oct. 16, 1990]." Older Workers Benefit Protection Act, Pub. L. No. 101-433, § 202(a), 104 Stat. 978, 984 (1990) (reprinted in note to 29 U.S.C. § 626 entitled "Effective Date of 1990 Amendment" (1998)). In common parlance, a waiver "occurs" when it becomes effective, i.e., when it is executed. For that reason, we conclude that the OWBPA's waiver requirements do not apply to waivers executed before enactment of the statute. *Accord Rice v. Brown Bros. Harriman & Co.*, No. 96 Civ. 6326(MBM), 1997 WL 129396, *5 (S.D.N.Y. Mar. 21, 1997). Because Seus executed her Form U-4 before the OWBPA was enacted, it cannot affect the arbitrability of her claim.

Second, assuming *arguendo* that the OWBPA did apply to Seus's case, its legislative history and the background against which it was enacted provide persuasive evidence that the protection it affords is limited to the waiver of substantive rights under the ADEA. As the Fifth Circuit explained in *Williams v. Cigna Financial Advisors, Inc.*,

> [i]n enacting the OWBPA, Congress' primary concern was with releases and voluntary separation agreements in which employees were forced to waive their rights. . . . [T]he OWBPA protects against the waiver of a right

or claim, not against the waiver of a judicial forum. The Supreme Court recognized this distinction in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985), in which it held that

> [b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum. . . . We must assume that if Congress intended the substantive protection afforded by a given statute to include protection against waiver of the right to a judicial forum, that intention will be deducible from text or legislative history.

We recognize that Congress, through the OWBPA, has protected terminated employees who waive their substantive rights under ADEA in exchange for a more favorable severance package; however, we find no clear indication that Congress was likewise concerned with protecting employees who agree to arbitrate claims that may arise during the course of their employment.

56 F.3d 656, 660-61 (5th Cir. 1995) (citations omitted).

The Supreme Court reads OWBPA in the same way. While OWBPA was not urged upon it as controlling authority in *Gilmer*, the Court did comment upon OWBPA during the course of its analysis there in a way that is highly relevant here. It observed:

> Gilmer also argues that compulsory arbitration is improper because it deprives claimants of the judicial forum provided for by the ADEA. Congress, however, did not explicitly preclude arbitration or other nonjudicial resolution of claims, *even in its recent amendments to the ADEA*. "[I]f Congress intended the substantive protection afforded [by the ADEA] to include protection against waiver of the right to a judicial forum, that intention will be deducible from text or legislative history."

500 U.S. at 29 (quoting *Mitsubishi Motors*, 473 U.S. at 628) (emphasis added). When referring to Congress's "recent amendments to the ADEA," the Supreme Court clearly

meant the OWBPA. *See id.* at 28 n.3. While dicta, the Court's comments provide persuasive evidence contradicting the EEOC's assertion that "[b]y its plain terms, the OWBPA prohibits the enforcement of any agreement that requires an individual, in advance of an actual dispute, to forgo her statutory right of action in district court." EEOC's Br. at 14. Clearly, the Supreme Court did not interpret the OWBPA's reference to "any right or claim" as encompassing procedural rights such as the right to a judicial forum.

We thus conclude that the ADEA, as amended by the OWBPA, still reflects no Congressional intent to except from the FAA predispute agreements to arbitrate ADEA claims.

3. *Title VII*

Although the holding in *Gilmer* involved only ADEA claims and not Title VII claims, numerous courts have determined that the holding is equally applicable to Title VII proceedings. *See, e.g., Metz v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 39 F.3d 1482, 1487 (10th Cir. 1994); *Bender v. A.G. Edwards & Sons, Inc.*, 971 F.2d 698, 700 (11th Cir. 1992); *Mago v. Shearson Lehman Hutton, Inc.*, 956 F.2d 932, 935 (9th Cir. 1992); *Willis v. Dean Witter Reynolds, Inc.*, 948 F.2d 305, 307 (6th Cir. 1991); *Alford v. Dean Witter Reynolds, Inc.*, 939 F.2d 229, 230 (5th Cir. 1991). Moreover, as we have noted, the Supreme Court in *Gilmer* expressly disavowed its earlier expressed view that an arbitral forum was inferior to a judicial one for deciding Title VII claims. *See* 500 U.S. at 34 n.5.

Because Title VII and the ADEA "are similar in their aims and substantive provisions," *Mago*, 956 F.2d at 935, we find Title VII entirely compatible with applying the FAA to agreements to arbitrate Title VII claims.

4. *Section 118 of the Civil Rights Act of 1991*

On November 21, 1991, more than six months after *Gilmer* was decided, Congress passed the Civil Rights Act of 1991. Section 118 of that Act provides that, "Where appropriate and to the extent authorized by law, the use of

alternative dispute resolution, including . . . arbitration, is encouraged to resolve disputes arising under [Title VII and the ADEA]." Pub. L. 102-166, § 118 (reprinted in notes to 42 U.S.C. § 1981). On its face, the text of § 118 evinces a clear Congressional intent to encourage arbitration of Title VII and ADEA claims, not to preclude such arbitration. The EEOC argues, nonetheless, that a Congressional intent to preclude predispute waivers of a judicial forum for Title VII claims can be discerned in the legislative history of § 118.

The EEOC points to two comments by the House Committee on Education and Labor as well as two remarks of individual legislators on the floor to support its position. In our judgment, however, no amount of commentary from individual legislators or committees would justify a court in reaching the result the EEOC would have us reach. The text adopted by the full Congress declares that lawful "arbitration . . . is encouraged to resolve disputes arising from [Title VII and the ADEA.]" That declaration simply cannot be "interpreted" to mean that the FAA is impliedly repealed with respect to agreements to arbitrate Title VII and ADEA claims that will arise in the future.[1] Other courts of appeals that have addressed the issue have recognized as much. *See Austin v. Owens-Brockway Glass Container, Inc.*, 78 F.3d 875, 881-82 (4th Cir.), *cert. denied*, ___ U.S. ___, 117 S. Ct. 432 (1996); *Matthews v. Rollins Hudig Hall Co.*, 72 F.3d 50, 53 n.4 (7th Cir. 1995).

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1. Not surprisingly there is ample legislative history to support a straightforward reading of the text of § 118. The Report of the House Committee on the Judiciary, for example, explains § 118 as follows:

> This section "encourages" the voluntary use of conciliation, mediation, arbitration, and other methods of resolving disputes under Civil Rights laws governing employment discrimination.
>
> We agree that voluntary mediation and arbitration are far preferable to prolonged litigation for resolving employment discrimination claims. . . .
>
> We recognize that mediation and arbitration, knowingly and voluntarily undertaken, are the preferred methods of settlement of employment discrimination disputes.

H.R. Rep. No. 40(II), 102d Cong., 1st Sess. 78 (1991), *reprinted in* 1991 U.S.C.C.A.N. 694, 764.

Nor do we believe this straightforward declaration of the full Congress can be interpreted to mean that the FAA is impliedly repealed with respect to agreements to arbitrate Title VII claims which were executed by an employee as a condition of securing employment. Thus, we respectfully disagree with the decision of the Court of Appeals for the Ninth Circuit in *Duffield v. Robertson Stephens & Co.*, No. 97-15698, 1998 WL 227469 (9th Cir. May 8, 1998). As we understand the opinion in that case, the court reads the preferatory clause, "where appropriate and to the extent authorized by law," in light of the legislative history, as a codification of a particular view of the decisional law regarding Title VII arbitration as it existed prior to the Supreme Court's decision in *Gilmer*. To us, it seems most reasonable to read this clause as a reference to the FAA. Moreover, we find nothing in the legislative history suggesting that this hortatory provision was intended to codify, and thus freeze, any particular view of the case law. Finally, even if we were to accept "authorized by law" as intended to codify case law, we would find the text incompatible with the notion that the law codified was case law inconsistent with a Supreme Court case decided six months before the passage of the Act.

C. *Other Challenges to the Validity of the Agreement*

Seus insists that anyone seeking to enforce an agreement to arbitrate Title VII and ADEA claims must establish that the other party entered the agreement "knowingly" and "voluntarily." She insists that Nuveen has failed to carry this burden. She argues as well that her agreement is unenforceable because it was a contract of adhesion and analogous to a "yellow dog contract."

1. *The Knowing and Voluntary Standard*

As we have previously noted, contracts covered by the FAA are "valid, irrevocable, and enforceable," save upon such grounds as exist at law or in equity for revocation of any contracts. As we have also noted, *Gilmer* establishes that a court can decline to enforce such a contract if and only if the party resisting arbitration can point to a

generally applicable principle of contract law under which the agreement could be revoked.

By "knowing" and "voluntary," Seus means more than with an understanding that a binding agreement is being entered and without fraud or duress. Determining whether an agreement to arbitrate is "knowing" and "voluntary," in her view, requires an inquiry into such matters as the specificity of the language of the agreement, the plaintiff's education and experience, plaintiff's opportunity for deliberation and negotiation, and whether plaintiff was encouraged to consult counsel. She does not contend that this heightened "knowing and voluntary" standard is a generally applicable principle of contract law. Rather, Seus finds that standard in cases like *Cirillo v. Arco Chemical Co.*, 862 F.2d 448 (3d Cir. 1988) where we found a heightened knowing and voluntary standard applicable to agreements releasing substantive claims under the ADEA.[2] Applying that standard here would be inconsistent with the FAA and *Gilmer*. Nothing short of a showing of fraud, duress, mistake or some other ground recognized by the law applicable to contracts generally would have excused the district court from enforcing Seus's agreement.

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2. Seus relies, as well, on *Prudential Ins. Co. of America v. Lai*, 42 F.3d 1299 (9th Cir. 1994). The court there held that a Form U-4 agreement to arbitrate under the NASD rules was unenforceable. The agreement was not "knowingly" entered insofar as employment disputes were concerned, according to the court, because the arbitration clause of the NASD rules did not specifically refer to employment disputes. We respectfully disagree with the decision of the court in *Lai*.

Finally, Seus, in support of her heightened "knowing and voluntary" standard, relies upon the provisions of the OWBPA and the Civil Rights Act of 1991 that we have already discussed. As we have explained, the referenced provisions of the OWBPA pertain only to the waiver or release of *substantive* ADEA rights claims, not procedural rights like the right to proceed in a judicial forum. With respect to the referenced legislative history of § 118, see fn. 1, p. 16, *supra*, we understand "knowingly and voluntarily" to invoke ordinary, well established principles of contract law rather than the heightened standard for which Seus contends.

2. *Contract of Adhesion*

Seus suggests that the arbitration agreement in the Form U-4 is invalid as a contract of adhesion because of the disparity in bargaining power between her and her employer. This very argument was rejected in *Gilmer*, however. Unequal bargaining power is not alone enough to make an agreement to arbitrate a contract of adhesion.

Moreover, even if we were to assume *arguendo* that the Form U-4 is a contract of adhesion, it would not be unenforceable. A contract of adhesion is invalid only where its terms unreasonably favor the other party. *See e.g.*, *Witmer v. Exxon Corp.*, 434 A.2d 1222, 1228 (Pa. 1981). In order for a contract to be invalidated as a contract of adhesion, the plaintiff "must allege both a lack of meaningful choice about whether to accept the provision in question, and that the disputed provisions were so one-sided as to be oppressive." *Stebok v. American Gen. Life & Accident Ins. Co.*, 715 F. Supp. 711, 714 (W.D. Pa.), *aff'd* 888 F.2d 1382 (3d Cir. 1989). The district court found, however, that the terms of Seus's Form U-4 were neither oppressive nor unconscionable. Similarly, the district court in *Beauchamp v. Great West Life Assurance Co.* concluded that the Form U-4 is not oppressive or unconscionable, explaining:

> The *Gilmer* court has held that plaintiff is not giving up substantive statutory rights through arbitration of her Title VII claim. Thus, her agreement to arbitrate is not substantively unconscionable. Nor is the language of the U-4 form unconscionable in that it misrepresents the existence or scope of the arbitration clause. The U-4 form clearly states that the applicant should read its provisions very carefully and that any claim between plaintiff and her firm would be arbitrated if required by the arbitration code of the organization with which she registered.

918 F. Supp. 1091, 1098 (E.D. Mich. 1996) (citation omitted). We agree. The terms of the Form U-4 that Seus signed were not oppressive, unconscionable, or unreasonably favorable to either the NASD or Nuveen, the third party beneficiary of the agreement.

3. *"Yellow Dog" Contract*

Finally, Seus suggests that the arbitration agreement in the Form U-4 should be invalidated because it is analogous to the "yellow dog contracts" of the nineteenth century, in which employees agreed to waive their right to join a union in order to obtain employment. Seus asserts that the two types of contracts are analogous because in both instances employers require employees to waive their statutory rights in order to obtain employment. She argues that because Congress invalidated yellow dog contracts in the Norris-LaGuardia Act of 1932, 29 U.S.C. § 103, this court should invalidate her contract. Seus's argument fails once again because, unlike the employees who signed yellow dog contracts, Seus did not waive her *substantive* statutory rights by signing the Form U-4.

In short, we conclude that the Form U-4 agreement to arbitrate was valid and binding under the FAA.

III. DOES THE AGREEMENT COVER THIS DISPUTE?

A. *The 1982 NASD Code of Arbitration Procedure*

Seus argues that the district court improperly dismissed her action against Nuveen because employment disputes were not covered by the NASD Code of Arbitration Procedure in effect at the time she signed her Form U-4. As we have noted, section 1 of that Code provided for arbitration of:

> any dispute . . . claim or controversy arising out of or in connection with the business of any member of the [NASD], with the exception of disputes involving the insurance business of any member which is also an insurance company: (1) between or among members; (2) between or among members and public customers, or others; and (3) between or among members [and] registered clearing agencies . . . .

Although the 1982 Code did not explicitly provide for the arbitration of employment disputes, we are persuaded that it encompassed such disputes and that Seus thus agreed to submit her Title VII and ADEA claims to arbitration.

As the district court pointed out, "[t]he majority of courts which have examined the pre-amendment NASD Code also have concluded that it covers employment disputes," while only the Seventh and Ninth Circuits have held otherwise. D. Ct. Op. at 10. The three different lines of reasoning that courts considering the issue have espoused were concisely explained by the Court of Appeals for the Second Circuit thus:

> In *Farrand v. Lutheran Brotherhood*, 993 F.2d 1253 (7th Cir. 1993), the Seventh Circuit held that § 1's three subsections ((1)-(3)) qualified the phrase "arising out of or in connection with the business of any member of the [NASD]," *see id.* at 1254; that an employee suing a member-employer fell into none of these subsections (most particularly that such an employee was not an "other[ ]" within the meaning of § 1(2)), *see id.* at 1254-55; and that employment-related disputes were therefore not arbitrable, *see id.* at 1255.
>
> In *Kidd v. Equitable Life Assurance Soc'y of the United States*, 32 F.3d 516 (11th Cir. 1994), the Eleventh Circuit disagreed and held that employment-related disputes are arbitrable. The Eleventh Circuit reasoned that § 1's three subsections applied, not back to that section's initial clause, but rather only to the adjoining "insurance exception" clause. *See id.* at 519. It therefore read § 1 to "require[ ] arbitration for any dispute connected to an NASD member's business, except for disputes involving the insurance business of an NASD member that are (1) between NASD members or (2) between NASD members and public customers or others." *Id.* The court thus found that an employee's claim against a member-employer *is* arbitrable under § 1's unqualified (as the court read it) opening clause. *See id.* at 519 & n. 5.
>
> The Tenth Circuit, in [*Armijo v. Prudential Ins. Co. of Am.*, 72 F.3d 793 (10th Cir. 1995)], added fuel to the fire. It rejected the Eleventh Circuit's reasoning that § 1's subsections applied only to the insurance exception clause; it agreed with the Seventh Circuit that the three subsections modified the initial clause.

> *See Armijo*, 72 F.3d at 798-99 n. 6. Contrary to *Farrand*, however, the court found that "others" in § 1(2) necessarily encompassed "associated persons" as used in § 8, and therefore included an aggrieved employee. *See id.* at 798-99. The court accordingly held that employment-related disputes are arbitrable, but not for the reason given by the Eleventh Circuit. See *id.* at 798.

Thomas James Assocs., Inc. v. Jameson, 102 F.3d 60, 64 (2d Cir. 1996). In *Jameson*, the Second Circuit, like the Tenth Circuit, concluded "that § 1's subsections apply to that section's opening clause, and not just to the insurance exception clause," *id.*, and that the term "others" as used in that section includes employees having employment-related disputes with a member firm, *id.* at 65.

With respect to the application of § 1's subsections, we adopt the Second Circuit's line of reasoning on this issue. As the *Jameson* court explained:

> We cannot fathom any possible reason why the NASD would except insurance business disputes from arbitration, but then only when those disputes involved certain parties. Rather, the NASD probably meant to exempt "*any* dispute involving the insurance business of an insurance company member from compulsory arbitration, not just those involving specific classes of individuals." To put it in the language of a grammarian, we therefore interpret the insurance exception clause as something "more akin to a parenthetical within the section rather than an independent clause modified by the language following the colon."

Id. at 64-65 (citations omitted). We agree, and likewise hold that § 1's subsections modify that section's opening clause, not the insurance exception clause.

With respect to the meaning of "others," the *Armijo* and *Jameson* courts pointed to several considerations which led them to conclude that the term encompasses employees with employment-related disputes. *See Jameson*, 102 F.3d at 65-66; *Armijo*, 72 F.3d at 798-800. First, to conclude otherwise would create a conflict between § 1 and § 8 of the

pre-Amendment NASD Code.[3] As the *Jameson* court explained:

> Unless he qualifies as an "other[ ]" under § 1(2), it is plain that Jameson does not fall into any category within § 1's subsections. And, on the other hand, § 8 clearly contemplates that Jameson, as an "associated person," will arbitrate his disputes with an NASD-member employer. If we were to read "others" to exclude Jameson, § 1 would take what § 8 gives, rendering § 8 utterly superfluous in this respect. Therefore, to avoid construing one provision as negating the other, "we must give Section 1 an interpretation at least as broad as that clearly called for in Section 8."

102 F.3d at 65. Second, interpreting "others" to include employees with employment-related disputes gives meaning to the language of the Form U-4, which clearly indicates that the applicant agrees that at least some disputes between her and her firm would be arbitrable. *See id.* at 65; *Armijo*, 72 F.3d at 799. Third, the NASD itself indicated as early as 1987 that the pre-Amendment Code applied to employment-related disputes between employees and member firms. *See Jameson*, 102 F.3d at 65; *Armijo*, 72 F.3d at 799.

Based on these considerations, "we cannot say 'with positive assurance' that 'others' does not include an employee with an employment-related dispute against a

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3. Section 8 of the pre-Amendment NASD Code provided:

> Any dispute, claim or controversy eligible for submission under Part I of this Code between or among members and/or associated persons, and/or certain others, arising in connection with the business of such member(s), or in connection with the activities of such associated person(s), shall be arbitrated under this Code, at the instance of: (1) a member against another member; (2) a member against a person associated with a member or a person associated with a member against a member; and (3) a person associated with a member against a person associated with a member.

NASD Manual – Code of Arbitration Procedure § 1 (reprint ed. May 1982).

member firm." *Jameson*, 102 F.3d at 65. It is at least ambiguous whether that term encompasses employees with employment-related disputes. "However, to acknowledge the ambiguity is to resolve the issue, because all ambiguities must be resolved *in favor* of arbitrability." *Armijo*, 72 F.3d at 798. Accordingly, we find that the district court correctly concluded that the pre amendment NASD Code provided for arbitration of employment disputes.

B. *The Compliance Clause and the Amended NASD Code*

On October 1, 1993, the NASD amended its Code of Arbitration Procedure to provide for the arbitration of "any dispute, claim or controversy . . . arising out of the employment or termination of employment of associated person(s) with any member . . ." NASD Arbitration Code, Rule 10101 (formerly § 1). Nuveen argues that, regardless of whether we conclude that the pre-amendment NASD Code requires arbitration of Seus's employment dispute, we should affirm the district court's order compelling arbitration based on the compliance clause in her Form U-4 and the fact that the NASD Code explicitly provided for the arbitration of employment disputes when she commenced this action. Seus, on the other hand, argues that because the Form U-4 compliance clause did not mention the arbitration clause and was contained in a different paragraph, the compliance clause is reasonably read only to require Seus to conform her behavior, as a securities dealer, to subsequent changes in the NASD rules.[4]

Seus's argument contradicts the holding of the vast majority of courts to consider this issue. Most courts have found that the Form U-4 compliance clause obligates a registrant to comply with the NASD Arbitration Code as it existed at the time she filed suit. *See, e.g., Cremin v. Merrill Lynch Pierce Fenner & Smith, Inc.*, 957 F. Supp. 1460, 1475-77 (N.D. Ill. 1997); *Schuetz v. CS First Boston Corp.*,

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4. As noted above, the Form U-4 compliance clause bound Seus to "abide by, comply with, and adhere to all the provisions, conditions and covenants of the . . . by-laws and rules and regulations as they may be adopted, changed or amended from time to time . . . ." App. at 5 (Form U-4, ¶ 2).

No. 96 Civ. 5557, 1997 WL 452392, *4 (S.D.N.Y. Aug. 8, 1997); *Stone v. Pennsylvania Merchant Group, Ltd.*, 949 F. Supp. 316, 323-24 (E.D. Pa. 1996). We agree. Seus clearly bound herself to comply with amendments to the NASD's rules, including those governing arbitration.

IV. SEUS'S MOTION TO DEPOSE THE NASD

Seus claims that current NASD arbitration procedures are inadequate to protect her statutory and due process rights. As evidence of this, she points to the NASD's recent decision to abandon its policy of requiring agreements to arbitrate employment discrimination claims as a condition of employment with a member.[5] Seus insists that the

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5. On December 17, 1997, after the district court decision in this case, the NASD submitted to the SEC the following proposed change to Rule 10201 (Required Submission) (formerly § 8) of the Code of Arbitration Procedure:

> (b) A claim alleging employment discrimination or sexual harassment in violation of a statute is not required to be arbitrated. Such a claim may be arbitrated only if the parties have agreed to arbitrate it, either before or after the dispute arose.

62 Fed. Reg. 66164, 66164 (Dec. 17, 1997). Seus views this proposed rule change as an explicit admission by NASD that absent employee free choice, neither it, nor the court, should rely on the Form U-4 to compel arbitration of all employment claims. Since the NASD has decided to give its registrants a choice between signing an agreement to arbitrate and reserving the right to file an employment-related claim in federal court, Seus argues, this court should allow Seus the same choice.

The NASD's abandonment of its policy of requiring employees to sign agreements to arbitrate as a condition of registration is irrelevant in this case. The rule change is only a proposal. The SEC has not yet approved it, nor is it obligated to do so. The proposed rule change has no legal force at this time. Moreover, even if the SEC approves the rule change, the NASD has requested that it not take effect until one year after such approval. 62 Fed. Reg. at 66167. Presumably, then, the rule change would not become effective until well after the completion of Seus's arbitration. In any event, the proposed amendment does not reflect a determination that the arbitral process is not fair and effective. It reflects only a policy decision that a commitment to arbitrate employment discrimination claims should not be required as a condition of employment. The amendment expressly recognizes that voluntary agreements to arbitrate will continue to be enforceable whether entered before or after the alleged violation occurs.

district court should have allowed her to conduct further discovery on this issue before reaching its decision to compel arbitration.

We review the district court's denial of Seus's motion for an abuse of discretion. We find none.

Congress has decreed that arbitration is a favored means of dispute resolution. While this does not mean that arbitration pursuant to any kind of arbitral process is consistent with federal policy, the detailed provisions of the NASD Code of Arbitration Procedure are sufficient to permit the kind of evaluation conducted in *Gilmer* and, as the district court observed, the process required by that Code is the functional equivalent of the process found in *Gilmer* to be consistent with the effective enforcement of the ADEA.[6] Moreover, if there be any inadequacies or unfairness in the application of those rules in this specific case, judicial review will be available. 9 U.S.C. § 10; *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1486-87 (D.C. Cir. 1997). Under these circumstances, declining to permit a deposition of the NASD prior to ordering submission of the dispute to arbitration was well within the discretion of the district court.

V. CONCLUSION

The order of the district court dismissing Seus's claims without prejudice and directing arbitration will be affirmed.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

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6. In addition to information about the process readily available from the Code, Seus sought to inquire into the race, sex, age and professional backgrounds of the arbitrators, procedures for selecting arbitrators, the cost of arbitration, the percentage of arbitration cases involving age and sex employment discrimination claims, the specific results of the arbitration decisions in employment discrimination cases, the location and scheduling of hearings, and the timeliness of decisions.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 97-1498

SHEILA WARNOCK SEUS,
Appellant

v.

JOHN NUVEEN & CO., INC.

On Appeal From the United States District Court
For the Eastern District of Pennsylvania
(D.C. Civil Action No. 96-cv-05971)

Present: BECKER*, and STAPLETON, *Circuit Judges,* and FEIKENS, ** *District Judge*

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* Honorable Edward R. Becker, United States Circuit Judge for the Third Circuit, assumed Chief Judge status on February 1, 1998.

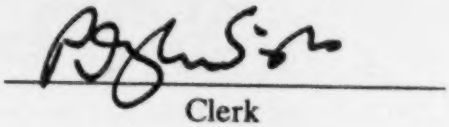
** Honorable John Feikens, Senior United States District Judge for the Eastern District of Michigan, sitting by designation.

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel on January 20, 1998.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered June 3, 1997, be, and the same is hereby affirmed. Costs taxed against appellant. All of the above in accordance with the opinion of this Court.

ATTEST:



Clerk

Dated: June 8, 1998

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 97-1498

SHEILA WARNOCK SEUS
Appellant

v.

JOHN NUVEEN & CO., INC.

On Appeal From the United States District Court
For the Eastern District of Pennsylvania
(D.C. Civil Action No. 96-cv-05971)

SUR PETITION FOR REHEARING

BEFORE: BECKER, *Chief Judge,* SLOVITER, STAPLETON, GREENBERG, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, McKEE, and RENDELL, *Circuit Judges,* and FEIKENS,* *District Judge*

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* Hon. John Feikens, Senior United States District Judge for the Eastern District of Michigan, was a member of the original panel. His vote is limited to panel rehearing only.

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is denied.

By the Court,

Circuit Judge

Dated: July 21, 1998
g & lcc: MK
SCR
JEB
ECJ
RJG

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

SHEILA WARNOCK SEUS,	:	
Plaintiff,	:	
v.	:	CIVIL ACTION
	:	NO. 96-5971
JOHN NUVEEN & CO., INC.,	:	
Defendant.	:	

ENTERED: 6/3/97
CLERK OF COURT

Gawthrop, J. June 2, 1997

MEMORANDUM

Before the court in this employment discrimination suit is Defendant's Motion to Dismiss or Stay and Compel Arbitration under the Federal Arbitration Act, 9 U.S.C. §§ 3-4. Plaintiff opposes this motion, arguing that she never agreed to arbitrate employment disputes and that arbitration would not adequately protect her statutory rights. In order to establish the inadequacy of the arbitral procedures at issue, Plaintiff wishes to depose the National Association of Securities Dealers pursuant to Fed. R. Civ. P. 30(b)(6). The United States Equal Employment Opportunity Commission has joined this action as Amicus Curiae. Upon the following reasoning, I shall grant Defendant's Motion to Dismiss and Compel Arbitration, and I shall deny Plaintiff's Motion to Depose the National Association of Securities Dealers.

I. *Background*

As a member of the National Association of Securities Dealers ("NASD"), Defendant John Nuveen Co., Inc. must register with the NASD all employees who deal directly with the public in the purchase and sale of securities. Employees register by filing a Uniform Application for Securities Industry Registration ("Form U-4"), a form developed by the Securities and Exchange Commission in conjunction with the national securities exchanges. Generally, execution of a Form U-4 is a pre-condition for employment with security brokers such as Nuveen.

In January, 1982, Nuveen hired Plaintiff Sheila Warnock Seus as a sales assistant. On April 20, 1982, she signed and filed a Form U-4 containing the following clause: "I agree to arbitrate any dispute, claim, or controversy that may arise between me and my firm, or a customer, or any other person, that is required to be arbitrated under the rules, constitutions, or by-laws of the organizations with which I register . . . ." The Form U-4 also contained a separate "compliance clause," in which Seus agreed "to abide by, comply with, and adhere to all the provisions, conditions and covenants of the statutes, constitutions, certificates of incorporation, by-laws and rules and regulations of the states and organizations as they are and may be adopted, changed or amended from time to time . . . ."

Because Seus registered with the NASD, the form incorporated by reference the NASD's Code of Arbitration Procedure ("NASD Code"). Seus did not receive a copy of this Code. Seus's supervisor told her that the arbitration provision would not affect her because it was designed to deal with brokers' commission disputes. In fact, the NASD Code covers far more than commission disputes. When Seus signed the Form U-4, the NASD Code provided in pertinent part

> for the arbitration of any dispute, claim, or controversy arising out of or in connection with the business of any member of the Association, with the exception of disputes involving the insurance business of any member which is also an insurance company:
>
> (1) between or among members;
>
> (2) between or among members and public customers, or others . . . .

§ 1, NASD Code, *quoted in Farrand v. Lutheran Bhd.*, 993 F.2d 1253, 1254 (7th Cir. 1993). In 1993, the NASD explicitly amended its Code to cover disputes "arising out of the employment or termination of employment of associated person(s) with any member . . . . § 1, NASD Manual (CCH) ¶ 3701 (1995).[1]

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1. The parties do not dispute that Nuveen is a "member" of the NASD and that Plaintiff is an "associated person."

Seus filed this Complaint in August, 1996, after receiving a right-to-sue notice from the United States Equal Employment Opportunity Commission ("EEOC"). Seus alleges that Nuveen retaliated against her when she complained of sexual harassment by a fellow employee. Nuveen allegedly discriminated against her on the basis of her sex and age by reducing her annual bonus in 1994, demoting her from her position as Vice President in April, 1995, and constructively discharging her in July, 1995. This conduct, she claims, violates Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e *et seq.*, the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et seq.*, and the Pennsylvania Human Relations Act ("PHRA"), 43 Pa. Stat. Ann. § 951 *et seq.*. She also is pressing a tort claim for the intentional infliction of emotional distress. Because these claims all arise from Seus's employment, Nuveen argues that they are subject to arbitration pursuant to the Form U-4 and the NASD Code, citing *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991). Thus, Nuveen moves to dismiss or stay this action and compel arbitration.

II. *Discussion*

A. Applicability of the Federal Arbitration Act

The Federal Arbitration Act ("FAA") governs arbitration agreements connected to transactions involving interstate commerce. 9 U.S.C. § 2. This statute embodies "a liberal federal policy favoring arbitration agreements." *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). The FAA not only recognizes the validity of arbitration agreements, but also mandates a stay of judicial proceedings if the suit involves an arbitrable issue. 9 U.S.C. §§ 2-3. If all claims are arbitrable, a court may dismiss the action instead of staying it. *Dancu v. Coopers & Lybrand*, 778 F. Supp. 832, 835 (E.D. Pa. 1991), *aff'd*, 972 F.2d 1330 (3d Cir. 1992). A court also may compel arbitration in accordance with the terms of the parties' agreement. 9 U.S.C. § 4.

A preliminary issue is whether the FAA applies to this arbitration agreement. Plaintiff argues the Form U-4 is part of

an employment contract and thus is outside the FAA's scope. The FAA explicitly excludes from its coverage "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1. The Supreme Court has found, however, that an application to register with a securities exchange is a contract with that exchange, not an employment contract. *Gilmer,* 500 U.S. at 25 n. 2. Similarly, the Form U-4 here is a contract with the NASD, not Nuveen, and thus it is not an employment contract within the meaning of the § 1 exclusion.

Even if the Form U-4 were an employment contract, the Third Circuit has limited the FAA § 1 exclusion to sailors, railroad workers, and other transportation workers who are "employed directly in the channels of commerce." *Great Western Mortgage Corp, v. Peacock,* ___F.3d___, 1997 WL 153012 at *4 (3d Ci.r. Apr. 3, 1997). While at Nuveen, Seus worked as a sales associate, wholesaler, office manager, and vice-president in the Packaged Products Sales Department. Because Seus never acted directly in the channels of commerce, the § 1 exclusion does not apply to any employment contract between Seus and Nuveen.

Plaintiff also suggests that this court may deny Defendant's Motion because her signature on the Form U-4 was neither notarized nor verified. The FAA, however, requires only a written agreement, not a signed one. 9 U.S.C. § 2. *See also Genesco, Inc, v. T. Kakiuchi & Co., Ltd.,* 815 F.2d 840, 846 (2d Cir. 1987). The absence of notarization or verification does not preclude the FAA's application. In short, the FAA governs this Form U-4's arbitration agreement.

B. Enforceability of the Arbitration Agreement

A finding the FAA applies to this agreement does not entail an automatic stay of litigation. Before a court may either stay litigation or compel arbitration, it must ensure that a valid arbitration agreement between the parties exists and that the dispute falls within the substantive scope of the agreement. *See PaineWebber, Inc. v. Hartmann,* 921 F.2d 507, 511 (3d Cir. 1990). A court generally should apply ordinary state-law principles on contract formation while performing this

task. *First Options of Chicago, Inc. v. Kaplan,* 514 U.S. 938, 115 S.Ct. 1920, 1924 (1995). However, in construing the contractual language or considering defenses to arbitration, a court should resolve in favor of arbitration any doubts regarding the scope of arbitrable issues. *Moses H. Cone Mem. Hosp.,* 460 U.S. at 24-25.

1. *Contractual Agreement to Arbitrate*

Under the FAA, an agreement to submit a dispute to arbitration "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Grounds for revocation include fraud[2] or the use of overwhelming economic power resulting in an adhesion contract. *See Gilmer,* 500 U.S. at 33.

Plaintiff argues that the Form U-4 is a classic unenforceable adhesion contract because employees sign the Form U-4 shortly after they are hired, when they lack bargaining power. Yet, inequality of bargaining power, standing alone, will not void contractual obligations. *See Witmer v. Exxon Corp.,* 495 Pa. 540, 434 A.2d 1222, 1228 (1981). *See also Gilmer,* 500 U.S. at 33 ("Mere inequality in bargaining power . . . is not a sufficient reason to hold that arbitration agreements are never enforceable in the employment context."). To invalidate an agreement as an adhesion contract, the plaintiff also must show that the contractual terms unreasonably favor the other party. *Witmer,* 434 A.2d at 1228. Plaintiff has made no such showing here. The terms of the Form U-4 appear neither oppressive nor unconscionable. *See Beauchamp v. Great West Life Assur. Co.,* 918 F. Supp. 1091, 1098-99 (E.D. Mich. 1996) (concluding that the Form U-4 is not an unenforceable adhesion contract under Michigan law). Thus, I do not find that this arbitration agreement is an unenforceable contract.

Seus also argues by analogy that the Form U-4 should be held unenforceable for the same reason that Congress invali-

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2. Plaintiff asserts that her supervisor told her that the arbitration agreement applied only to commission disputes. This assertion raises the possibility of fraud or mistake which might bar enforcement of the agreement. However, Plaintiff does not pursue this argument, and the record before me does not support invalidating the arbitration agreement on these grounds.

dated "yellow dog" contracts in which employees agree to waive their right to join a union: employees should not be required to waive their statutory rights in order to obtain employment. The analogy between the Form U-4 and yellow dog contracts fails, however, because Plaintiff did not waive her substantive statutory rights. The Supreme Court has found that "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." *Gilmer,* 500 U.S. at 26 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.,* 473 U.S. 614, 628 (1985)).

Plaintiff also challenges the very existence of a contract between herself and Nuveen to arbitrate disputes. *See Stone v. Pennsylvania Merchant Group, Ltd.,* 915 F. Supp. 727, 730 (E.D. Pa. 1996) (finding insufficient evidence to decide whether employee's Form U-4 created a contract with employer). In *Stone,* the defendant provided no evidence of its membership in the NASD. By contrast, Nuveen has submitted the affidavit of its Vice President, Michael G. Gaffney, who avers that Nuveen is a member of the NASD. As an NASD Member, Nuveen is an intended third-party beneficiary who may enforce the Form U-4 arbitration agreement. *See Stone v. Pennsylvania Merchant Group, Ltd.,* 949 F. Supp. 316, 320-22 (E.D. Pa. 1996).

Finally, both the plaintiff and the EEOC argue that the arbitration agreement is unenforceable because Seus did not knowingly agree to waive her right to litigate. They stress that the Form U-4 does not itself discuss employment disputes and, at the time Seus signed the form, the NASD Code did not expressly cover employment disputes. *See Prudential Ins. Co. v. Lai,* 42 F.3d 1299 (9th Cir. 1994), *cert. denied,* ___U.S.___, 116 S.Ct. 61 (1995) (refusing to enforce a Form U-4 signed before 1993 because neither the form nor the NASD Code notified plaintiffs that they would be required to arbitrate Title VII claims). *See also Renteria v. Prudential Ins. Co.,* No. 95-16659, 1997 WL 259421 (9th Cir. May 20, 1997). However, this case is distinguishable from *Lai* because most of the alleged wrongful conduct occurred after the NASD Code's

amendment.[3] Through the Form U-4's compliance clause, Seus agreed to be bound by changes to the NASD Code, which now clearly gives notice of its inclusion of employment disputes. Further, I agree with *Lai's* critics that the Form U-4's arbitration clause provides sufficient notice of its coverage. *See, e.g., Beauchamp,* 918 F. Supp. at. 1098. Seus's misunderstanding of that clause's scope will not excuse her contractual obligations under the Form U-4. *Id. See also Warren v. Greenfield,* 407 Pa. Super. 600, 595 A.2d 1308, 1313 n. 4 (1991).

2. *Claims Within Scope of Arbitration Agreement*

Having found that the Form U-4 contains a valid arbitration clause, I must now decide whether the arbitration agreement covers employment disputes. Under Pennsylvania law, the agreement must objectively reveal the parties' intent to arbitrate a particular issue before a court will compel arbitration. *PaineWebber, Inc. v. Johnson,* 888 F. Supp. 46, 49 (E.D. Pa. 1995). Again, a court should resolve in favor of arbitration any doubts concerning the scope of arbitrable issues. *Moses H. Cone Mem. Hosp.,* 460 U.S. at 24-25.

At the time Seus signed her Form U-4, the NASD Code did not explicitly mention employment disputes. Seus thus argues that she did not agree to submit employment claims to NASD arbitration. This argument is unavailing. The NASD itself took the position that employment-related disputes were arbitrable under the pre-amendment Code, and that they amended the Code only to clarify any possible ambiguity. *See* 58 Fed. Reg. 39,070, 39,071 (1993) (NASD statement accompanying proposed Code amendments). The majority of courts which have examined the pre-amendment NASD Code also have concluded that it covers employment disputes. *See, e.g., Thomas James Assoc., Inc. v. Jameson,* 102 F.3d 60, 65-66 (2d Cir. 1996); *Armijo v. Prudential Ins. Co.,* 72 F.3d 793, 798 (10th Cir. 1995); *Kidd v. Equitable Life Assur. Soc'y,* 32 F.3d 516, 518 (11th Cir. 1994); *Association of Inv. Brokers v. Securities & Exchange Comm'n,* 676 F.2d 857, 861 (D.C. Cir. 1982). *But see*

3. The complaint alleges that the sexual harassment occurred in 1991 and 1992. However, Seus's complaints and Nuveen's acts of alleged retaliation and discrimination all took place in 1994 and 1995.

Farrand, 993 F.2d at 1255; *Lai*, 42 F.3d at 1305. I agree that the pre-1993 NASD Code encompasses employment disputes such as the one now before me.

Further, in light of the Form U-4 compliance clause, courts generally agree that the NASD Code should be examined at the time the plaintiff filed the suit rather than when the plaintiff signed the Form U-4. *See, e.g., Kuehner v. Dickinson & Co.*, 84 F.3d 316, 320 (9th Cir. 1996); *Stone*, 949 F. Supp. at 323; *Wojcik v. Aetna Life Ins. & Annuity Co.*, 901 F. Supp. 1282 (N.D. Ill. 1995), *clarified*, 916 F. Supp. 729 (N.D. Ill. 1996). As mentioned above, most of the alleged wrongful conduct took place after the NASD Code's amendment, when it clearly covered employment disputes. Thus, Plaintiff's claims are within the scope of the arbitration agreement.

C. Impact of Post-*Gilmer* Laws

The EEOC and Plaintiff also contend that *Gilmer* should be reconsidered in light of subsequent statutory enactments. In *Gilmer*, the Supreme Court held that an individual may agree, before a dispute arises, to submit ADEA claims to compulsory arbitration.[4] At the same time, the Court acknowledged that an individual cannot be compelled to arbitrate a statutory claim where "'Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory right at issue.'" 500 U.S. at 26 (quoting *Mitsubishi*, 473 U.S. at 628). The question then becomes whether the Older Workers Benefit Protection Act of 1990 ("OWBPA"), 29 U.S. C. § 626(f), and § 118 of the Civil Rights Act of 1991, 42 U.S. C. § 1981 note, manifest a congressional intent to preclude arbitration of employment discrimination claims. I find that they do not.

---

4. Courts generally have concluded that Title VII claims also may be subjected to compulsory arbitration. *See, e.g., Metz v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 39 F.3d 1482, 1487 (10th Cir. 1994); *Bender v. A.G. Edwards & Sons, Inc.*, 971 F.2d 698, 700 (11th Cir. 1992). Similarly, PHRA claims also may be arbitrated. *See Kaliden v. Shearson Lehman Hutton, Inc.*, 789 F. Supp. 179, 184 (W.D. Pa. 1991).

Neither the OWBPA nor § 118 contradicts the Supreme Court's finding that individuals may agree in advance to submit future employment disputes to arbitration. The OWBPA bars the waiver only of substantive rights under the ADEA; it does not bar an agreement to switch from a judicial to an arbitral forum. *See Williams v. Cigna Fin. Advisors, Inc.*, 56 F.3d 656, 660-61 (5th Cir. 1995); *Rice v. Brown Bros. Harriman & Co.*, No. 96-6326, 1997 WL 129396 (S.D.N.Y. Mar. 21, 1997); *Kahalnik v. John Hancock Funds, Inc.*, No. 95-3933, 1996 WL 145842 at *3 (N.D. Ill. Mar. 27, 1996). Thus, the OWBPA does not prevent a pre-dispute agreement to arbitrate ADEA claims. Nor does § 118 evidence congressional hostility to pre-dispute arbitration agreements. Section 118 does not discourage but rather encourages the use of arbitration to resolve disputes arising under Title VII and the ADEA. *See Matthews v. Rollins Hudig Hall Co.*, 72 F.3d 50, 53 n. 4 (7th Cir. 1995). Although the EEOC highlights legislative history which may be interpreted to preclude pre-dispute agreements, "[e]very case decided in the Courts of Appeal under § 118 of the 1991 amendments to the Civil Rights Act has enforced anticipatory agreements to arbitrate claims involving statutory rights." *Austin v. Owens-Brockway Glass Container, Inc.*, 78 F.3d 875, 882 (4th Cir.), *cert. denied*, ___U.S.___, 117 S.Ct. 432 (1996) (citing cases). I am not inclined to swim against the tide of such substantial, persuasive, and pervasive precedent.

D. Protection of Statutory Rights in Arbitration

The final issue is whether the NASD arbitration procedures would adequately protect Plaintiff's statutory rights under the ADEA and Title VII. For a federal claim to be arbitrable, arbitration must be compatible with the remedial scheme of the federal statute at issue. *See Gilmer*, 500 U.S. at 28 (quoting *Mitsubishi*, 473 U.S. at 637). Although courts should not assume that arbitral procedures are inadequate, a court may examine claimed procedural inadequacies in the specific case before it. *Gilmer*, 500 U.S. at 30, 33.

Many of Seus's arguments, however, echo those rejected by the Supreme Court in *Gilmer* when it examined the New York Stock Exchange's arbitral procedures, procedures which

mirror those of the NASD. For example, the Court rejected the argument that arbitral procedures are deficient because arbitrators rarely issue written opinions. 500 U.S. at 31-32. I also shall follow the lead of the Supreme Court in declining "to indulge the presumption" that the NASD "will be unable or unwilling to retain competent, conscientious and impartial arbitrators." *Gilmer*, 500 U.S. at 30 (quoting *Mitsubishi*, 473 U.S. at 634). Plaintiff herself will be permitted to assess the qualifications of the arbitrators hearing her claims: the NASD requires disclosure of the arbitrators' backgrounds and permits a preemptory challenge. §§ 21-22, NASD Manual (CCH) ¶¶ 3721-22 (1995). Further, the NASD recognizes the public policy implications of employment discrimination claims and thus requires that the arbitral panel have a majority of public arbitrators. *See* 58 Fed. Reg. 39,070, 39,071 (1993) (NASD statement accompanying proposed Code amendments); § 9(a), NASD Manual (CCH) ¶ 3709 (1995).

Plaintiff also questions whether NASD arbitrators will protect her Due Process rights. Specifically, she notes that arbitrators are not required to follow the law, and that an arbitral award cannot be vacated even if they misinterpret the law. In fact, the arbitrator's training guide does not tell arbitrators that they do not have to follow the law but rather states that they are not "strictly bound by case precedent or statutory law." *See also Illyes v. John Nuveen & Co., Inc.*, 949 F. Supp. 580, 584 (N.D. Ill. 1996). If the arbitrators manifestly disregard the law, a court may vacate their award. *See* 9 U.S.C. § 10. As for Plaintiff's concern that she may be barred from presenting witnesses or evidence in support of her allegations, this concern is adequately addressed under the FAA. *See* 9 U.S.C. § 10(c) (permitting court to vacate award where arbitrator refuses "to hear evidence pertinent and material to the controversy").

Plaintiff also worries that NASD arbitrators might disregard Title VII's provisions for punitive damages and fee shifting. Yet the arbitrator's training guide explicitly provides that arbitrators "can consider punitive damages as a remedy." The NASD Code also appears to permit the arbitrators to allocate

costs. *See, e.g.*, § 43, NASD Manual ¶ 3743 (1995). There is no indication that Plaintiff will be denied her substantive statutory rights.

Finally, in order to prove the inadequacy of NASD arbitral procedures, Seus requests that she be allowed to depose the NASD.[5] However, the Supreme Court already has recognized the adequacy of the New York Stock Exchange's procedures, which are functionally equivalent to those of the NASD. Further, after reviewing her requests, I find that much of the information Seus seeks may be found within the NASD Code itself. *See, e.g.*, §§ 32-33, NASD Manual ¶¶ 3732-33 (1995) (detailing discovery procedures and subpoena powers). Under these circumstances, I see no need to grant Plaintiff's Motion to Depose the NASD.

III. *Conclusion*

In sum, I find that Plaintiff agreed to submit all employment-related disputes to arbitration. Her Title VII, ADEA, PHRA and tort claims all relate to her employment and thus are arbitrable. *See, e.g., Weinstein v. The Equitable Life Assur. Soc'y*, No. 96-3614, 1996 WL 557321 (E.D. Pa. Sep. 26, 1996). Because all of Plaintiff's claims are subject to arbitration, retaining jurisdiction would serve no purpose. Thus, I shall grant Defendant's Motion to dismiss this action and compel arbitration.

An order follows.

---

5. Specifically, she wishes to obtain testimony regarding: the number of arbitrators, including their race, sex, age and professional backgrounds, the procedure for selecting arbitrators, the cost of arbitration, the percentage of arbitration cases involving age and sex employment discrimination claims, the specific results of the arbitration decisions in employment discrimination cases, the availability of discovery, the available processes to compel the appearance of witnesses and testimony at the arbitration hearing, the hearing's location, the scheduling of hearings, and the timeliness of decisions.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

SHEILA WARNOCK SEUS, Plaintiff,	:	
v.	:	CIVIL ACTION
	:	NO. 96-5971
JOHN NUVEEN & CO., INC., Defendant.	:	

ORDER

AND NOW, this 2nd day of June, 1997, upon the reasoning in the attached Memorandum:

1. Defendant's Motion to Dismiss and Compel Arbitration is GRANTED. Pursuant to the Federal Arbitration Act, 9 U.S.C. §§ 3-4, all claims are DISMISSED without prejudice. The parties are to arbitrate these claims pursuant to the terms of their arbitration agreement.

2. Plaintiff's Motion for Leave to Take Deposition of the National Association of Security Dealers Pursuant to Fed. R. Civ. P. 30(b)(6) is DENIED.

BY THE COURT

/s/ Robert S. Gawthrop, III, J.

Robert S. Gawthrop, III, J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

FILED FEB 25 1997

Sheila Warnock Seus,	:	
Plaintiff,	:	
	:	
v.	:	No. 96-CV-5971
	:	Judge Robert S.
	:	Gawthrop, III
John Nuveen & Company, Inc.,	:	
Defendant.	:	

MOTION FOR LEAVE TO TAKE DEPOSITION OF THE NATIONAL ASSOCIATION OF SECURITY DEALERS PURSUANT TO FED.R.CIV.P. 30 (b)(6)

Plaintiff, Sheila Warnock Seus ("Seus" or "plaintiff"), by and through her attorneys, Markowitz and Richman, hereby moves for an Order compelling the deposition of the National Association of Security Dealers ("NASD") pursuant to Rule 30(b)(6) of the Federal Rules of Civil Procedure and Rule 26.1 of the Local Rules of the United States District Court for the Eastern District of Pennsylvania. In support thereof, plaintiff states as follows:

1. On August 29, 1996, Seus filed her complaint against defendant, John Nuveen & Company, Incorporated ("Nuveen" or "Defendant"), seeking a jury trial in this court on her claims of Title VII sexual discrimination, Age Discrimination in Employment Act ("ADEA") age discrimination, Title VII sexual harassment, unlawful retaliatory discharge, intentional infliction of emotional distress and state based statutory and common law unlawful discrimination claims. See Complaint ¶¶1-74.

2. On December 9, 1996, in response to plaintiff's complaint, Nuveen filed a Motion to Dismiss and Compel Arbitration and require Seus to proceed before NASD arbitrators under NASD rules and procedures to arbitrate her Title VII, age discrimination, retaliation and other employment-related claims.

3. On December 24, 1996, Seus filed her opposition to Nuveen's Motion to Compel Arbitration. For the reasons presented in her opposition to the Motion to Compel Arbitration, Ms. Seus asserts that the "mandatory" arbitration aspect of the Form U-4 she was required to sign in 1982 is unenforceable as a matter of statutory and/or contract law. In her opposition, she asserts, *inter alia,* that the court should not defer to the alleged arbitration agreement because the NASD arbitration procedures do not adequately protect Seus' statutory rights and remedies under Title VII or the Age Discrimination in Employment Act.

4. On January 13, 1997, the Equal Employment Opportunity Commission ("EEOC") filed an Amicus Brief opposing the enforcement of the alleged arbitration agreement because the substantive protection of Title VII and the ADEA would be significantly undermined.

5. In its response to the EEOC's position, Nuveen repeated its unsupported claims that the NASD arbitration process adequately protects litigants statutory rights and requests the court to reject the EEOC's and Seus' position that the NASD arbitration system is biased and unfair.

6. Seus submits that the evidence and case law presented in the briefs filed by her and the EEOC in opposition to the Motion to Compel Arbitration are sufficient for the court to deny the motion. If the court is inclined to grant the motion to compel, however, Seus requests that before the court does so she be allowed, pursuant to Fed.R.Civ.Pro. 30(b)(6), to take the deposition of an appropriate official designated by the NASD to testify, among other things, about the following:

- The number of NASD arbitrators, including their race, sex, age and professional backgrounds.
- The costs associated with NASD arbitration.
- The procedure for selecting arbitrators.
- The percentage of NASD arbitration cases involving age and sex employment discrimination claims.
- The results of the arbitration decisions in employment discrimination cases, including information on the percentage of cases where plaintiffs prevailed, whether or not attorney's fees were awarded; whether or not prevailing plaintiffs were awarded costs or punitive damages; what percentage of prevailing plaintiffs were granted equitable relief and the form of the relief granted.
- Information detailing the availability of discovery in the form of depositions, interrogatories, document requests and the power to compel such discovery.
- Information detailing the available processes to compel the appearance of witnesses and testimony at the arbitration hearing.
- The location of the arbitration hearings.
- Information regarding the scheduling of hearings and whether they are held and continued on a timely basis and whether the decisions are issued in a timely way.

WHEREFORE, plaintiff respectfully requests that the court deny the defendant's motion to compel arbitration of her Tile VII and ADEA claims. In the alternative, in the event the court is inclined to grant defendant's motion and deprive plaintiff her right to have her claims adjudicated in federal court, Seus requests that she be allowed to take the deposition of a representative of NASD to obtain information regarding the rules, procedures and results obtained when previous employment discrimination claims were decided. Once that information is obtained, it will be presented to the court for its review and consideration before a final decision is entered on Nuveen's motion.

Respectfully submitted,

MARKOWITZ AND RICHMAN

By: /s/ Stephen C. Richman

Stephen C. Richman, Esquire
Robert P. Curley, Esquire
121 South Broad Street
1100 North American Building
Philadelphia, PA 19107
215-875-3100

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Sheila Warnock Seus,	:	
Plaintiff,	:	
v.	:	
	:	No. 96-CV-5971
John Nuveen & Company, Inc.,	:	Judge Clarence C.
Defendants.	:	Newcomer

AFFIDAVIT OF SHEILA WARNOCK SEUS

Plaintiff, Sheila Warnock Seus, states and deposes as follows:

1. I am the plaintiff in the above-captioned cause.

2. When I was first hired in January 1982 by John Nuveen & Company, I worked as an inside sales assistant.

3. On April 20, 1982, I was presented with a Form U-4 to sign. When the Form U-4 was presented to me for signature I was told by my then supervisor that the portion of the form that called for arbitration of disputes would not affect me because it dealt with brokers who were paid commissions and was meant to deal with commission disputes.

4. Execution of a Form U-4 is a pre-condition to employment at Nuveen and all other security brokers. I had no input into the terms and conditions contained in the Form U-4.

5. I was not provided copies of the rules of NASD at any time.

6. I was not advised to seek legal assistance before signing the Form U-4; nor did I seek legal assistance before signing it.

7. At the time I signed the Form U-4, I was not advised by anyone at Nuveen, nor was I under the impression that I was waiving my right to file a complaint against Nuveen in federal court under Title VII of the Civil Rights Act of 1964, as amended by the Civil Rights Act of 1991, and the Age Discrimination in Employment Act, or waiving my right to have my claims under these acts decided by a jury.

8. At the time I signed the Form U-4, I was not advised by anyone at Nuveen, nor was I under the impression that I was waiving my right to file a complaint against Nuveen in federal or state court under the Pennsylvania Human Relations Act or state common law, or waiving my right to have my claims under these acts decided by a jury.

9. At no time after 1982 did I ever fill out another Form U-4.

10. At no time after 1982 was I ever advised of any changes in the rules of the NASD as they might relate to any claimed obligation to arbitrate any disputes I had or may have had against Nuveen under the statutes mentioned above in paragraphs 7 and 8.

11. I never knowingly agreed to submit any employment dispute I had against Nuveen to arbitration or forgo any statutory rights and remedies available to me under either federal or state law.

12. Attached to this affidavit as Exhibit 1 is a true and correct copy of Nuveen's Personal Policy, which was given to me sometime after December 1991. An examination of the manual discloses that mandatory arbitration of employment disputes is never mentioned anywhere in the manual. It is particularly noteworthy that there is no discussion of mandatory arbitration in the discussion of Nuveen's sexual harassment policy. (See page 43 of the policy.)

13. This affidavit is only a summary of some of the facts relating to my employment at Nuveen and is not intended to be a comprehensive statement of all the information I know in relation to this case.

I have read the above statement consisting of thirteen paragraphs and it is true and correct to the best of my knowledge and belief.

/s/ Sheila Warnock Seus
Sheila Warnock Seus

Sworn to and subscribed before me this
20th day of December 1996.

/s/ Linda DiCrosta
Notary Public

Notarial Seal
Linda DiCrosta, Notary Public
Philadelphia, Philadelphia County
My Commission Expires Jan. 13, 1997
Member, Pennsylvania Association of Notaries

CONSTITUTIONAL, STATUTORY, and REGULATORY PROVISIONS INVOLVED

Section 118 of the 1991 Civil Rights Act, Pub. L. 102-166, Title I, 105 Stat. 1081, reprinted in notes to 42 U.S.C. §1981:

> Where appropriate and to the extent authorized by law, the use of alternative dispute resolution including settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials, and arbitration is encouraged to resolve disputes arising under the Acts or provisions of Federal law amended by this title.

Older Workers Benefit Protection Act of 1990 ("OWBPA"), 29 U.S.C. §626(f), provides in relevant part:

> (1) An individual may not waive any right or claim under this chapter unless the waiver is knowing and voluntary. Except as provided in paragraph (2), a waiver may not be considered knowing and voluntary unless at a minimum –
>
> (A) the waiver is part of an agreement between the individual and the employer that is written in a manner calculated to be understood by such individual, or by the average individual eligible to participate;
>
> (B) the waiver specifically refers to rights or claims arising under this Act;
>
> (C) the individual does not waive rights or claims that may arise after the date the waiver is executed;
>
> (D) the individual waives rights and claims only in exchange for consideration in addition to anything of value to which the individual already is entitled;
>
> (E) the individual is advised in writing to consult with an attorney prior to executing the agreement;
>
> (F) (i) the individual is given a period of least 21 days within which to consider the agreement; or

(ii) if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the individual is given a period of at least 45 days within which to consider the agreement;

(G) The agreement provides that for a period of at least 7 days following the execution of such agreement, the individual may revoke the agreement, and the agreement shall not become effective or enforceable until the revocation period has expired;

Federal Arbitration Act 9, U.S.C. §1 et seq.

§2. Validity, irrevocability, and enforcement of agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

§10. Same; vacation; grounds; rehearing

(a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration –

(1) Where the award was procured by corruption, fraud, or undue means.

(2) Where there was evident partiality or corruption in the arbitrators, or either of them.

(3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon su..fi-

cient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or any other misbehavior by which the rights of any party have been prejudiced.

(4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(5) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.

Supreme Court, U.S.
FILED
DEC 29 1998
OFFICE OF THE CLERK

No. 98-719

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

SHEILA WARNOCK SEUS,

Petitioner,

vs.

JOHN NUVEEN & CO., INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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24 pp

QUESTION PRESENTED

Whether the court below properly dismissed and compelled to arbitration before the National Association of Securities Dealers ("NASD") Petitioner's Title VII and ADEA claims, where Petitioner signed as a condition of her employment with Respondent a Uniform Application for Securities Industry Registration ("Form U-4") which provided for arbitration of all employment disputes.

PARTIES TO THE PROCEEDING

The petition accurately lists the parties to the proceeding.

STATEMENT PURSUANT TO RULE 29.6

Pursuant to Supreme Court Rule 29.6, Respondent, John Nuveen & Company, Inc., states that it is a wholly-owned subsidiary of the John Nuveen Company. The John Nuveen Company, in turn, is a majority-owned subsidiary of the St. Paul Companies.

Respondent has no nonwholly owned subsidiaries.

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Petition for Writ of Certiorari, *Robertson, Stephens & Co. v. Duffield*, __ U.S. __, 119 S. Ct. 465 (1998) (No. 98-237) 12

APPENDIX

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STATUTES INVOLVED

The following statutes are involved in this case: Section 118 of the Civil Rights Act of 1991, Pub. L. 102-166, *reprinted in* notes to 42 U.S.C. § 1981 ("Section 118") and the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* ("FAA").

STATEMENT OF THE CASE

Respondent, John Nuveen & Company, Inc. ("Nuveen"), incorporates by reference the statement of facts of the court below, reprinted in the Appendix to the Petition at 2a-4a.

REASONS FOR DENYING THE WRIT

I.

THE PETITION RAISES NO ERROR IN THE COURT OF APPEALS' DECISION.

This Court should not grant the petition because the Court of Appeals' decision was faithful to *Gilmer v. Interstate/ Johnson Lane Corp.*, 500 U.S. 20 (1991) and consistent with the majority of circuit courts concluding that agreements to arbitrate statutory employment discrimination claims are enforceable.

A. The Court Of Appeals Properly Applied State Contract Law To Petitioner's Arbitration Agreement Instead Of A Heightened "Knowing and Voluntary" Standard.

Petitioner continues to characterize as *substantive* her right to have her Title VII and ADEA claims heard in federal court. Pet. at 15.[1] With that characterization, Petitioner maintains that

1. Petitioner's Petition for Writ of Certiorari and Appendix thereto are cited as "Pet. at __" and "Pet. App. at __a," respectively.

arbitration agreements which embrace statutory employment claims must be subjected to a higher level of scrutiny than that reserved for other kinds of contracts. Pet. at 15.

This Court, however, recently made clear that the right to proceed in a judicial forum is not *substantive*. *See Wright v. Universal Maritime Service Corp.*, __ U.S. __, 119 S. Ct. 391, 396 (1998); *see also Gilmer*, 500 U.S. at 26 ("By agreeing to arbitrate a statutory claim, a party does not forgo substantive rights afforded by the statute. . . ."). Therefore, cases such as *Cirillo v. Arco Chemical Co.*, 862 F.2d 448 (3d Cir. 1988), which articulate and apply a heightened "knowing and voluntary" standard to the release — as opposed to the arbitration — of substantive rights, are inapplicable.[2]

Therefore, having found an agreement to arbitrate in the language of Petitioner's Form U-4, Pet. App. at 3a, the Court of Appeals appropriately limited further inquiry into the circumstances of its execution to those that would have affected the formation of any other contract under state law. *See First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995) (under the FAA, inquiries into the enforceability of arbitration agreements are to be guided by ordinary state-law principles that govern the formation of contracts generally); *accord*, *Gilmer*, 500 U.S. at 33 (arbitration agreements are to be enforceable "save upon such grounds as exist at law or in equity for the revocation of any contract") (quoting 9 U.S.C. § 2). Because the Court of Appeals found no evidence in the record of "fraud, duress, mistake or some other ground recognized by

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2. Indeed, *Wright* made clear that the lesser "clear and unmistakable" standard applicable to collectively-bargained arbitration agreements is not applicable where an individual waives his own right to proceed judicially. *Wright*, 119 S. Ct. at 396-97 (distinguishing *Gilmer* and finding an agreement to arbitrate "any dispute, claim or controversy" in individual context sufficient to embrace federal statutory claims).

the law applicable to contracts generally [which] would have excused the district court from enforcing Seus' agreement," Pet. App. 15a, it properly affirmed the district court's order compelling arbitration.

B. The Court Of Appeals Properly Denied Plaintiff's Request To Conduct Discovery Into The Adequacy Of The NASD's Arbitration Scheme Because Its System Is Adequate And Effective Judicial Review Is Available.

Petitioner also maintains that she was wrongfully denied discovery into the adequacy of the NASD's arbitration scheme prior to dismissal by the district court. Pet. at 5-9. However, the decision to compel arbitration without prospective inquiry was correct and consistent with *Gilmer* because the NASD's procedures are adequate to protect Petitioner's substantive statutory rights and significant judicial review is available should Petitioner be unable to vindicate those rights.

Far from simply acknowledging that an arbitration clause exists and compelling arbitration without any consideration of the arbitral process at issue, both the Court of Appeals and the district court carefully considered the adequacy of NASD arbitration. Pet. App. at 23a, 36a-38a. Both noted that the NASD Code of Arbitration Procedure is detailed and that its procedures mirror those of the NYSE, which this Court previously found in *Gilmer* to be adequate. Pet. App. at 23a, 36a-38a; *see NASD Code of Arbitration Procedure*, NASD Manual (CCH) Rule 10000 *et seq.* (1997) ("NASD Code"); *see also Nieminski v. John Nuveen & Co.*, No. 96 C 1960, 1997 WL 43241, at *6 (N.D. Ill. Jan. 23, 1997) (comparing specific arbitration provisions of the NYSE and NASD). In addition to its other provisions, the NASD Code also contains substantial safeguards against arbitral bias — Petitioner's primary concern throughout this litigation — including:

- disclosure of the arbitrators' backgrounds, disclosure of circumstances which might preclude an arbitrator from rendering an impartial decision, peremptory challenges and challenges for cause. NASD Code, Rules 10310-10312.

- a requirement that arbitration panels considering statutory employment disputes contain a majority of arbitrators not from the securities industry. *See* NASD Code, Rules 10202 & 10308; *see also* 58 Fed. Reg. 39070, 39071 (July 21, 1993) (SEC Release No. 34-32639) (NASD statement accompanying Code amendments recognizing public policy implications of claims of employment discrimination).

In light of these detailed provisions protecting Petitioner's substantive rights and their functional equivalence to those examined in *Gilmer*, Petitioner's request to depose the NASD was properly denied.

Petitioner's request was also properly denied because sufficient judicial review remains available to her in the unlikely event she is mistreated during the arbitration process. The D.C. Circuit recognized in *Cole v. Burns Int'l Security Services*, 105 F.3d 1465 (D.C. Cir. 1997) that both the FAA and case law provide for meaningful judicial review of public law issues decided by arbitrators. *See Cole*, 105 F.2d at 1486. The FAA, itself, provides that arbitration awards can be vacated on several grounds. *See* 9 U.S.C. § 10(a) (*e.g.*, fraud, partiality, corruption, arbitrator misconduct, refusal to hear evidence and any other misbehavior by which the rights of any party may have been prejudiced). In addition to the grounds set forth in the FAA, courts may also set aside arbitration awards if they are contrary

to "some explicit public policy" that is "well defined and dominant" and determined "by reference to the laws and the legal precedents." *Cole*, 105 F.3d at 1486. This Court has also indicated that arbitration awards can be vacated if they are in "manifest disregard of the law." *See First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 942 (1995); *see also Gilmer*, 500 U.S. at 32 n.4 ("[A]lthough judicial scrutiny of arbitration awards necessarily is limited, such review is sufficient to ensure that arbitrators comply with the requirements of the statute at issue.") (citation and internal quotes omitted).

Because sufficient judicial review of arbitral decisions is available, substantial, prospective inquiry by the court below into the adequacy of the NASD's arbitration scheme was unnecessary.

C. The Court Of Appeals Properly Concluded That Section 118 Of The Civil Rights Act Of 1991 Endorsed Arbitration.

Both this case, and the Ninth Circuit's decision in *Duffield v. Robertson Stephens & Co.*, 144 F.3d 1182 (9th Cir.), *cert. denied*, 119 S. Ct. 465 (1998), raise the issue of whether Section 118 of the Civil Rights Act of 1991, Pub. L. 102-166, *reprinted in* notes to 42 U.S.C. § 1981 ("Section 118"), manifests a Congressional intent to preclude mandatory arbitration of statutory discrimination claims. The Ninth Circuit in *Duffield* concluded that it does, and Petitioner urges the Court to adopt *Duffield*'s evisceration of *Gilmer* based on that provision. Pet. at 15-16. The weight of circuit court authority, however, is to the contrary and reveals that the Court of Appeals properly interpreted Section 118 as a Congressional endorsement of arbitration as a method of resolving federal discrimination claims.

Section 118's terms are clear and unambiguous:

> Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution including settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials, and *arbitration* is encouraged to resolve disputes arising under the Acts or provisions of Federal law amended by this title (emphasis added).

With the exception of the Ninth Circuit, every circuit court to have expressly considered this language — the Fourth, Seventh and Eighth — has interpreted Section 118 literally and concluded that it encourages the use of arbitration to resolve Title VII and ADEA claims. *See Austin v. Owens-Brockway Glass Container, Inc.*, 78 F.3d 875, 881 (4th Cir.), *cert. denied*, 117 S. Ct. 432 (1996) ("The language of [Section 118] could not be any more clear in showing Congressional favor towards arbitration."); *Matthews v. Rollins Hudig Hall Co.*, 72 F.3d 50, 54 n.4 (7th Cir. 1995) ("[T]he Civil Rights Act of 1991 encouraged the use of arbitration to resolve ADEA claims.") (citing Section 118); *Patterson v. Tenet Healthcare, Inc.*, 113 F.3d 832, 837 (8th Cir. 1997) ("[T]he arbitrability of Title VII claims finds support in the Civil Rights Act of 1991.") (citing Section 118).

Three other circuits — the Fifth, Tenth and the District of Columbia — deciding cases filed after passage of Section 118 have impliedly reached the same conclusion, albeit without explicit discussion of Section 118. *See Mouton v. Metropolitan Life Ins. Co.*, 147 F.3d 453, 455 (5th Cir. 1998) (Title VII claims compelled to arbitration); *Armijo v. Prudential Ins. Co. of America*, 72 F.3d 793, 797-98 (10th Cir. 1995) (same); *Cole v. Burns Int'l Security Services*, 105 F.3d 1465, 1472-73 (D.C. Cir. 1997) (same).

Finally, three circuits — the First, Fifth and Tenth — have interpreted virtually identical language contained in the Americans with Disabilities Act[3] as manifesting Congressional intent to encourage arbitration. *See Bercovitch v. Baldwin School, Inc.*, 133 F.3d 141, 151 (1st Cir. 1998) ("The meaning of [42 U.S.C. § 12212], far from evidencing an intention to preclude arbitration, can only be interpreted as favoring it."); *Miller v. Public Storage Management, Inc.*, 121 F.3d 215, 218 (5th Cir. 1997) ("[t]he explicit language of the ADA advocates the use of alternative dispute resolution. . . .") (citing 42 U.S.C. § 12212); *McWilliams v. Logicon, Inc.*, 143 F.3d 573, 576 (10th Cir. 1998) ("In fact, the Act encourages arbitration of Americans with Disabilities disputes") (citing 42 U.S.C. § 12212).

Against these decisions from *six* other circuits, the Ninth Circuit in *Duffield* stands alone in its conclusion that Section 118 prohibits arbitration of statutory employment disputes. *Duffield*'s interpretation, however, is predicated entirely on a judicial odyssey through Section 118's legislative history designed from the outset to reach a construction of the statute clearly in conflict with its unambiguous terms. *See Duffield*, 144 F.3d at 1195-99.[4] The Court of Appeals properly declined

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3. 42 U.S.C. § 12212 provides:

> Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials, and arbitration, is encouraged to resolve disputes arising under this chapter.

4. The Ninth Circuit's reading of Section 118's legislative history is also suspect. As the court below observed, "there is ample legislative history to support a straightforward reading of the text of § 118." Pet. App. 13a n.1. For example, the Report of the House Committee on the Judiciary explains Section 118 as follows:

(Cont'd)

to follow the Ninth Circuit's lead. Indeed, as the Fourth Circuit in *Austin* admonished:

> Even if the provisions of the legislative history are contrary to the statute, the statute must prevail. . . . Especially in that event, the reasoning of Justice Scalia, concurring, in *Thompson v. Thompson*, 484 U.S. 174, 188, 191-92, 108 S. Ct. 513, 520-21, 522, 98 L. Ed. 2d 512 (1988) should apply: "Committee reports, floor speeches, and even colloquies between Congressman, . . . are frail substitutes for bicameral vote upon the text of a law and its presentment to the President."

Austin, 78 F.3d at 882 (citation omitted); *see also Johnson v. Hubbard Broadcasting, Inc.*, 940 F. Supp. 1447, 1458 (D. Minn. 1996) (a court can cite legislative history to support practically any proposition).

(Cont'd)

> This section "encourages" the voluntary use of conciliation, mediation, arbitration, and other methods of resolving disputes under Civil Rights laws governing employment discrimination.
>
> We agree that voluntary mediation and arbitration are far preferable to prolonged litigation for resolving employment discrimination claims. . . .
>
> We recognize that mediation, knowingly and voluntarily undertaken, are the preferred methods of settlement of employment discrimination disputes.

H.R. Rep. No. 40(II), 102d Cong., 1st Sess. 78 (1991), *reprinted in* 1991 U.S.C.C.A.N. 694, 764. Significantly, the Ninth Circuit cites none of this contrary legislative history in its discussion. *See Duffield*, 144 F.3d at 1195-99.

II.

THE DECISION OF THE COURT OF APPEALS WILL HAVE LIMITED PRECEDENTIAL VALUE BECAUSE BOTH THE NASD AND THE NYSE HAVE ABANDONED MANDATORY ARBITRATION OF STATUTORY EMPLOYMENT CLAIMS.

But even were this Court inclined to grant the petition to correct a perceived error in the Court of Appeals' decision, the petition should nevertheless be denied because its decision has virtually no precedential effect.

This case arises in the unique — and now historical — context of a securities firm requesting a court to compel to arbitration the statutory discrimination claims of one of its employees because she signed an industry-wide registration application (Form U-4) requiring her to arbitrate:

> any dispute, claim or controversy that may arise between me and my firm . . . that is required to be arbitrated under the rules, constitutions, or by-laws of the organizations with which I register . . . .

Pet. App. at 3a (quoting Form U-4); *see Gilmer*, 500 U.S. at 23 (same).

At the time the Court of Appeals rendered its decision, both the National Association of Securities Dealers ("NASD") and the New York Stock Exchange ("NYSE") required employees of member firms to arbitrate all statutory employment disputes against their employers. NASD Rule 10101 provided for the arbitration of "any dispute, claim, or controversy . . . arising out of the employment or termination of employment of associated person(s) with any member. . . ." Pet. App. at 3a (quoting *NASD Manual — Code of Arbitration*

Procedure Rule 10101 (formerly § 1) (1997)); *see also* 62 Fed. Reg. 66164, 66165 (Dec. 17, 1997) (SEC Release No. 34-39421) (quoting NASD Rule 10101). Similarly, NYSE Rule 347 provided for the arbitration of:

> [a]ny controversy between a registered representative and any member or member organization arising out of the employment or termination of employment of such registered representative.

Gilmer, 500 U.S. at 23; *see also* 63 Fed. Reg. 52782, 52782 n.3 (Oct. 1, 1998) (quoting NYSE Rule 347).

However, on June 22, 1998, two weeks after the Court of Appeals issued its decision in this matter, the Securities and Exchange Commission ("SEC") approved a major change to the NASD's Code of Arbitration Procedure, eliminating the requirement that registered representatives arbitrate employment discrimination claims. *See* 63 Fed. Reg. 35299, 35303 (June 29, 1998) (SEC Release No. 34-40109). The NASD rule change goes into effect on January 1, 1999. *Id.* The text of the approved rule change is reprinted in Appendix A hereto at 1a.

The NYSE quickly followed suit, filing with the SEC on September 24, 1998 proposed amendments to NYSE Rules 347 and 600 to exclude from mandatory arbitration any claim of employment discrimination, including a claim of sexual harassment, unless the parties have agreed to arbitrate the claim *after it has arisen*. *See* 63 Fed. Reg. 52782, 52782 (Oct. 1, 1998) (SEC Release No. 34-40479). The text of the NYSE's proposed rule changes is reprinted in Appendix B hereto at 2a.[5]

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5. SEC approval of the NYSE's proposed rule changes is imminent. Indeed, the NYSE filed its proposed rule changes in response to SEC (Cont'd)

Because the country's two largest securities exchanges which previously required arbitration of statutory discrimination claims have now abandoned that requirement,[6] the decision of the Court of Appeals below is of historical significance only. It would be a waste of this Court's scarce judicial resources to review for error a decision which is now, for all intents and purposes, without precedential value in the securities industry.

III.

THE CIRCUIT SPLIT CREATED BY *DUFFIELD* HAS BEEN RESOLVED BY CHANGES TO THE NASD'S AND NYSE'S ARBITRATION RULES.

One month prior to the Court of Appeals' decision in this case, the Ninth Circuit decided *Duffield v. Robertson Stephens & Co.*, 144 F.3d 1182 (9th Cir. 1998). Although reaching a contrary result, *Duffield* presented facts functionally indistinguishable from those presented here. Like Petitioner, Tonja Duffield was an employee of a member of the NASD who was required as a condition of her employment to sign a Form U-4. *Id.* The arbitration clause contained in that Form U-4 obligated her to "arbitrate any dispute, claim or controversy

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Chairman Arthur Levitt's suggestion that all national securities exchanges "promptly change their rules to conform to those of the NASD." 63 Fed. Reg. at 52783 & n.10 (quoting SEC News Release 98-61, June 23, 1998).

6. On November 2, 1998, the country's third largest securities exchange, the American Stock Exchange ("Amex"), announced the completion of its merger with the NASD. Aaron Lucchetti, *NASD, Amex Complete Marriage*, WALL ST. J., November 3, 1998, at C1. Pursuant to that merger, the Amex became a wholly-owned subsidiary of the NASD, *id.*, presumably ending mandatory arbitration of discrimination claims in that organization as well.

. . . that is required to be arbitrated under the rules, constitutions, or by-laws of the organizations with which I register. . . ." *Id.* Like Respondent, Robertson Stephens & Company, relying on Duffield's Form U-4 and § 1 (now Rule 10101) of the NASD Code of Arbitration Procedure, sought to compel arbitration of her sex discrimination and sexual harassment claims brought under Title VII. *Id.* at 1186. Unlike the Third Circuit in this case, however, the Ninth Circuit reversed the district court's order compelling arbitration, concluding that Congress intended in enacting the Civil Rights Act of 1991 to preclude the compulsory arbitration of statutory employment claims. *Id.* at 1202-03.

On August 4, 1998, Robertson Stephens petitioned this Court to review the Ninth Circuit's decision, primarily to resolve the split between the Ninth and Third Circuits. *See* Petition for Writ of Certiorari at 9-10, *Robertson, Stephens & Co. v. Duffield*, __ U.S. __, 119 S. Ct. 465 (1998) (No. 98-237). Petitioner makes the same request here. Pet. at 15-16.

On November 9, 1998, however, this Court denied Robertson Stephens' petition. *Robertson, Stephens & Co. v. Duffield*, __ U.S. __, 119 S. Ct. 465 (1998). Petitioner articulates no compelling reason in her petition why this case should be treated differently. Nor could she. With the recent rule changes governing securities industry arbitration, *supra* at pp. 9-11, the difference of opinion between the Ninth and Third Circuits over the effect of signing a Form U-4 on an employee's subsequent right to pursue statutory discrimination claims in federal court is of no practical significance for future litigants.[7]

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7. Petitioner, however, must arbitrate *her* claims before the NASD, notwithstanding the NASD's recent rule change. NASD Regulation, Inc. has stated that the rule change applies only to claims filed on or after January 1, 1999 — the effective date of the change. *See* 63 Fed. Reg. at

(Cont'd)

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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35301, 35302. Because Petitioner filed her claims in federal court on August 29, 1996, the rule change does not apply to her. Moreover, under the mandate rule, the Court of Appeals' affirmance of the order compelling arbitration is binding on the district court. *See Casey v. Planned Parenthoed of Pennsylvania*, 14 F.3d 848, 856 (3d Cir.) ("an inferior court has no power or authority to deviate from the mandate issued by an appellate court") (citation and internal quotes omitted), *stay denied*, 510 U.S. 1309 (1994); *accord, Donohoe v. Consolidated Operating & Production Corp.*, 30 F.3d 907, 910 (7th Cir. 1994) (same).

APPENDIX

APPENDIX A — APPROVED CHANGES TO NATIONAL ASSOCIATION OF SECURITIES DEALERS CODE OF ARBITRATION PROCEDURE

Approved Changes to National Association of Securities Dealers Code of Arbitration Procedure

10201. Required Submission

(b) A claim alleging employment discrimination, including a sexual harassment claim, in violation of a statute is not required to be arbitrated. Such a claim may be arbitrated only if the parties have agreed to arbitrate it, either before or after the dispute arose.

Italics indicate new language.

* * *

APPENDIX B — PROPOSED CHANGES TO NEW YORK STOCK EXCHANGE ARBITRATION RULES

Proposed Changes to New York Stock Exchange Arbitration Rules

Rule 347.

(a) Except as provided in paragraph (b), [A]*any* controversy between a registered representative and any member or member organization arising out of the employment or termination of employment of such registered representative by and with such member or member organization shall be settled by arbitration, at the instance of any such party, in accordance with the arbitration procedure prescribed elsewhere in these rules.

(b) A claim alleging employment discrimination, including any sexual harassment claim, in violation of a statute shall be eligible for arbitration only where the parties have agreed to arbitrate the claim after it has arisen.

Rule 600.

(f) Any claim alleging employment discrimination, including any sexual harassment claim, in violation of a statute shall be eligible for submission to arbitration under these Rules only where the parties have agreed to arbitrate the claim after it has arisen.

Brackets indicate deleted language; italics indicate new language.

* * *